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28 Attorneys for Plaintiff OWEN DIAZ

19
20 **UNITED STATES DISTRICT COURT**
21
22 **NORTHERN DISTRICT OF CALIFORNIA**

23 OWEN DIAZ

24 Plaintiff,

25 v.

26 TESLA, INC. dba TESLA MOTORS, INC.

27 Defendant.

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Case No. 3:17-cv-06748-WHO

26 **JOINT PROPOSED AND DISPUTED
27 JURY INSTRUCTIONS**

28 Pretrial Conference Date: February 27, 2023
Time: 2:00 p.m.

Trial Date: March 27, 2023
Complaint filed: October 16, 2017

1 Pursuant to the Case Management Conference, Plaintiff Owen Diaz (“Mr. Diaz”) and
2 Defendant Tesla, Inc. (“Tesla”) hereby submit the following jointly proposed and disputed jury
3 instructions. Instructions that the parties dispute (“Disputed Instructions”) are listed first,
4 followed by instructions the parties agree upon (“Joint Proposed Instructions”). Each Disputed
5 Instruction to which a party objects entirely is accompanied by: (A) Mr. Diaz’s position for or
6 against the instruction (“Plaintiff’s Position”); and (B) Tesla’s position for or against the
7 instruction (“Defendant’s Position”). Each Disputed Instruction to which a party objects only
8 partially is accompanied by: (A) Mr. Diaz’s proposed version of the instruction (“Plaintiff’s
9 Proposed Version of Instruction”); (B) Tesla’s proposed version of the instruction, marking in
10 redline any variation from Mr. Diaz’s proposal (“Defendant’s Proposed Version of Instruction”);
11 (C) argument by Mr. Diaz in support of his proposal (“Plaintiff’s Position In Support Of His
12 Proposed Version Of Instruction”); and (D) argument by Tesla in support of its proposal
13 (“Defendant’s Position In Support Of Its Proposed Version Of Instruction”).
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1 **DISPUTED JURY INSTRUCTIONS**
2

3 **[DISPUTED] JURY INSTRUCTION NO. 1.**
4

5 **PRIOR FINDINGS OF TESLA'S LIABILITY**
6

7 **A. Plaintiff's Proposed Version Of Instruction**
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9 It has already been conclusively determined that defendant Tesla, Inc. is liable to plaintiff
10 Owen Diaz for three different violations of law:
11

- 12 1. Tesla subjected Mr. Diaz to a racially hostile work environment;
- 13 2. Tesla failed to prevent one or more of Mr. Diaz's supervisors and one or more of his
14 non-immediate supervisors or co-workers from racially harassing Mr. Diaz, and Tesla or a
15 member of Tesla's management knew or should have known of the harassment yet failed to take
16 prompt, effective remedial action; and
- 17 3. Tesla negligently supervised or continued the employment of one of Mr. Diaz's
18 supervisors, Ramon Martinez.

19 You must accept each of these liability findings as true. Your task is first to decide what
20 amount of damages should be awarded to compensate Mr. Diaz for the harms he suffered; and
21 second, what amount of punitive damages would be appropriate to punish Tesla for its wrongful
22 conduct and to deter future violations against others.

23 **B. Defendant's Proposed Version Of Instruction**
24

25 ~~It has already been conclusively determined that defendant~~ Defendant Tesla, Inc.,
26 ~~is~~ has been found liable to plaintiff Plaintiff Owen Diaz for three ~~different~~ violations of law:
27

1. ~~Tesla subjected~~ Mr. Diaz to experienced a racially hostile work environment while
working for Tesla;
2. Tesla failed to prevent one or more of Mr. Diaz's supervisors and one or more of his
non-immediate supervisors or co-workers from racially harassing Mr. Diaz, and Tesla or a
member of Tesla's management knew or should have known of the harassment and failed to take
prompt, effective remedial action; and

1 3. Tesla negligently supervised or negligently continued ~~the employment of~~to employ
 2 one of Mr. Diaz's supervisors, Ramon Martinez.

3 You must accept each of these ~~liability~~ findings as true. ~~Your task is decide first,~~

4 Based on these findings, you must decide two issues:

5 First, you must decide what amount of damages- , if any, should be awarded to
 6 compensate Mr. Diaz for any injury you find was caused by Tesla.

7 ~~the harms he suffered; and second~~Second, you must decide what amount of punitive
 8 damages- , if any, would be appropriate to punish Tesla for its wrongful conduct and to deter
 9 future violations against others.

10 **C. Plaintiff's Position In Support Of His Proposed Version Of Instruction**

11 As an initial matter, Plaintiff objects to Tesla's recent change of position in which it seeks
 12 to reject the first jury's finding that it is liable for punitive damages and to obtain reconsideration
 13 of the Court's prior ruling that only the *amount* of punitive damages is at issue. In a twisted
 14 reading of the Court's prior orders, Tesla is now unwilling to accept that this is a "damages only
 15 retrial" focused on the amounts of non-economic and punitive damages. Tesla's last-minute
 16 request to completely reopen the first jury's special verdict finding Tesla liable for punitive
 17 damages directly contradicts Tesla's (and Plaintiff's) understanding of the permissible scope of
 18 the retrial, an understanding that informed all of the parties' communications until Monday,
 19 February 6, 2023 at 5:15 p.m.. That is when Tesla sent an email to Plaintiff's counsel stating, for
 20 the first time, that it no longer believed the first jury's special verdict finding that Mr. Diaz was
 21 entitled to punitive damages was controlling. Plaintiff objects to Tesla's eleventh-hour re-
 22 interpretation of the Court's Post-Trial Order and all subsequent orders and to Tesla's new
 23 instructions requiring the retrial to decide for itself, notwithstanding the first jury's amply
 24 supported findings, that Tesla's violations of federal law were made with malice, oppression or
 reckless disregard of Plaintiff's rights.

25 Plaintiff also specifically objects to Tesla's revised version of this instruction, which does
 26 not adequately inform the retrial jury what the first jury actually determined in its liability
 27 findings in favor of Mr. Diaz. The special verdict form asked the first jury to determine whether
 28 Tesla was liable on each claim for relief, and expressly incorporated by reference the specific

1 jury instructions that defined the terms and stated the required elements of each of those claims
 2 for relief. Tesla's proposed jury instructions would keep those ultimate conclusions while
 3 eliminating the explanatory context, making it impossible for a retrial jury comprised of non-
 4 attorneys to understand what the liability jury necessarily found. Unless the retrial jury is
 5 instructed, as the first jury was instructed, concerning the meaning of relevant terms and the
 6 elements that Mr. Diaz had to prove to establish liability, that retrial jury will have a legally
 7 inadequate understanding of which facts have been definitively established and which facts
 8 remain open to evidentiary dispute (which Tesla's attorneys would undoubtedly seek to exploit if
 9 the jury were not clearly instructed as to what the first jury actually found).

10 Instructing the retrial jury on the elements of the claims for which liability has been
 11 established is consistent with the approach taken by federal courts in California and elsewhere in
 12 damages retrials. Without those instructions, the retrial jury will not know when Tesla's evidence
 13 and argument contradicts the first jury's binding liability determinations, a gap in information
 14 that will inevitably lead to confusion and inefficiency.

15 Tesla's version of this instruction is incomplete, inaccurate, and misleading in several
 16 respects. First, with respect to Mr. Diaz's hostile work environment claim, the instruction must
 17 inform the jury that Tesla has already been found liable for creating a hostile work environment
 18 and that the second jury is bound by that finding. Defendant frames its instruction in terms of
 19 what Mr. Diaz "experienced," to leave open the possibility in the jurors' minds that the racially
 20 hostile work environment may have been caused by some persons or entities other than Tesla.
 21 But the verdict form makes clear that the racially hostile work environment was caused "by
 22 Tesla," Mr. Diaz's joint employer. With respect to the damages questions, Tesla improperly
 23 inserts "if any" with respect to the questions at issue. But because the first jury found, in
 24 determining *liability*, that Tesla's wrongful conduct caused quantifiable harm, a nominal
 25 damages instruction or possibility of a nominal damages instruction is entirely improper and
 26 would contradict the liability verdict. *See, e.g.*, Special Verdict form Q. 6; Jury Ins. No. 34
 27 (requiring finding that "Plaintiff was harmed"); Jury Ins. No. 35 (requiring finding that "Ramon
 28 Martinez's unfitness or incompetence harmed Owen Diaz"). It would be contrary to the first
 jury's verdict for the retrial jury to find no harm and thus to award only nominal damages. Tesla

1 should not be permitted to argue that its wrongful conduct did not cause Mr. Diaz to suffer *any*
 2 *harm.*

3 Plaintiff asks the Court for specific instructions because he is hoping to avoid a replay of
 4 some of the issues experienced in Judge Chen's courtroom recently in the *In Re Tesla (Littleton)*
 5 case, 18-cv-04865. In *Littleton*, the Court determined at summary adjudication that certain
 6 tweets by Elon Musk were false. Despite that finding, Tesla's lead trial counsel (who is also lead
 7 trial counsel here) argued contrary to that finding by suggesting that the statement was only
 8 "technically inaccurate."

9 This Court saw a preview of this tactic when Tesla discussed the scope of testimony
 10 relating to the replacement PMK witness, Ms. Chenoa Chavez. Tesla asserted that the scope of
 11 that replacement witness's testimony should be limited only by the PMK topics and that remedial
 12 conduct not testified to in the first trial should be admissible in the retrial. Tesla keeps pushing
 13 back against this Court's clear rulings concerning the limited scope of retrial, and the instructions
 14 Mr. Diaz is proposing are needed to prevent this improper type of argument by Tesla.

15 With respect to the language in the instruction regarding "conclusively determined"
 16 versus a "finding," it should not even be a close call. Yes, the first jury made findings. But the
 17 point of the Court's order that the second damages-only trial is truly limited only to damages is
 18 that those findings are conclusive and binding on retrial. Mr. Diaz included this language in the
 19 proposed instruction to preclude Tesla from arguing that even though the first jury made one set
 20 of "findings," the second jury can make different "findings" and is not bound by what the first
 21 jury concluded with respect to liability. Tesla's proposed use of the term "if any" is an example
 22 of how Tesla seeks to limit the binding nature of the first jury's findings. The prior jury found
 23 liability and significant harm to Mr. Diaz caused by Tesla's wrongful conduct. It would be an
 24 inconsistent verdict that found zero damages for Mr. Diaz here, yet that is clearly how Tesla is
 seeking to argue it.

25 **D. Defendant's Position In Support Of Its Proposed Version Of Instruction**

26 Several of Tesla's proposed edits to this instruction are non-substantive and intended for
 27 clarity—such as to refer to the parties by their names and to state the jury's task more directly.
 28 Tesla also proposes to refer to what has previously been "found" rather than "conclusively"

1 determined,” as a jury’s verdict is generally referred to as a “finding,” and the “conclusively
 2 determined” formulation may be confusing to the jury and prejudicial to Tesla.

3 Tesla further added the words “if any” to track the language of the damages instructions
 4 the Court gave in the first trial, and because, as discussed below in relation to the compensatory
 5 and punitive damages instructions, it is accurate to instruct the jury that it is not required to
 6 award any amount of compensatory or punitive damages. Mr. Diaz is wrong to argue that the
 7 first jury already found “quantifiable harm” and that the second jury is bound to apply that
 8 finding. No matter what the first jury found by way of “quantifiable harm,” Mr. Diaz chose to
 9 nullify such finding when he elected a new trial on damages. It is now the sole and independent
 10 obligation of the second jury to determine whether Mr. Diaz has met his burden of proving by a
 11 preponderance of the evidence whether he is entitled to any amount of compensatory or punitive
 12 damages. Mr. Diaz also mistakenly conflates the first jury’s implicit finding of “harm” to Mr.
 13 Diaz with a finding that Mr. Diaz is entitled to any amount of damages as a result of such harm.
 14 The latter question is for the second jury to determine on this damages retrial. Mr. Diaz’s
 15 complaints about the timing of Tesla’s proposal of this instruction are meritless. Tesla has
 16 proposed a near-identical version of this instruction for weeks, and proposed this final version
 17 two days before the parties’ deadline to file disputed jury instructions, three weeks before the
 18 pretrial conference, and six weeks before trial is set to begin, and thus it is undoubtedly timely.
 19 See *Nash v. Lewis*, 365 F. App’x 48, 51 n.2-3 (9th Cir. 2010) (party “timely objected, before the
 20 jury began deliberating, to all instructions proposed but not given” and “preserved his objection
 21 to the verdict form’s [omission] because [the party]’s proposed verdict form included a space for
 22 the jury to find” the proposed finding “before the jury rendered its verdict and was discharged”).
 23 Indeed, both parties have been revising their proposed jury instructions leading up to the
 24 deadline to file them with the Court. Mr. Diaz has had a full and fair opportunity to oppose this
 25 instruction, and his focus on the timing of Tesla’s proposal of this instruction reveals the
 26 inadequacy in his substantive opposition to it.

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[DISPUTED] JURY INSTRUCTION NO. 2.

HOSTILE WORK ENVIRONMENT BASED ON RACE

(Instruction Nos. 26 & 27 in 1st trial; modified and combined for retrial)

Because it has been conclusively determined that Tesla subjected Mr. Diaz to a racially hostile work environment, you are also required to accept as true the following findings:

1. Mr. Diaz was subjected to slurs, insults, jokes or other verbal comments or physical contact or intimidation of a racial nature;
2. The conduct was unwelcome;
3. The conduct was sufficiently severe or pervasive to alter the conditions of Mr. Diaz's employment and to create a racially abusive or hostile work environment;
4. Mr. Diaz perceived the working environment to be abusive or hostile; and
5. A reasonable African American man in Mr. Diaz's circumstances would consider the working environment to be abusive or hostile.

Unwelcome conduct is “severe or pervasive” if it altered the conditions of employment and created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.

A. Plaintiff's Position

Plaintiff proposes this instruction to accurately inform the retrial jury what the first jury actually determined in its liability findings in favor of Mr. Diaz. The special verdict form asked the first jury to determine whether Tesla was liable on each claim for relief, and expressly incorporated by reference the jury instructions that defined the terms and stated the required elements of each of those claims for relief. Tesla’s opposition to this proposed jury instruction would eliminate the context of the liability finding, making it impossible for a retrial jury comprised of non-attorneys to understand what the liability jury necessarily found. The context of the conduct that caused Mr. Diaz’s damages is important to determining the correct amount of compensatory and punitive damages. Unless the retrial jury is instructed, as the first jury was instructed, concerning the meaning of relevant terms and the elements that Mr. Diaz had to prove to establish liability, that retrial jury will have a legally inadequate understanding of which facts

1 have been definitively established and which facts remain open to evidentiary dispute. In
 2 addition, the retrial jury must also have a precise understanding of the nature of the different
 3 claims because it can assess punitive damages *only* with respect to Plaintiff's federal law claims,
 4 not Plaintiff's state law negligence claim, and it needs to know the basis for the federal law
 5 liability findings.

6 Without the liability instructions proposed by Mr. Diaz, the retrial jury will not know
 7 when Tesla's evidence and argument contradicts the first jury's binding liability determinations,
 8 a gap in information that will inevitably lead to confusion and inefficiency – and could too easily
 9 be exploited by Tesla.

10 Instructing the retrial jury on the elements of the claims for which liability has been
 11 established is consistent with the approach taken by federal courts in California and elsewhere.
 12 See, e.g., *United States v. J-M Mfg. Co., Inc.*, 2018 WL 705532, at *7 (C.D. Cal. Jan. 31, 2018)
 13 (“[T]he scope of the Phase One jury's findings includes both the expressed findings of the jury,
 14 as well as those implied by the expressed findings. In making this assessment, the Court may
 15 look to the Verdict itself, the instructions presented to the jury, as well as the evidence proffered
 16 at the trial.”) (citing, *inter alia*, *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469,
 17 1473 (9th Cir. 1993)).

18 Defendant's cited authority is not to the contrary. Its two cases merely stand for the
 19 unremarkable proposition that a court need not instruct the jury on irrelevant issues. But the
 20 factual findings made by the liability jury *are* relevant (and important) for the damages jury to
 21 understand because they form the basis for the first jury's decision and for the award of damages
 22 in the retrial.

23 Without the liability instructions, the retrial jury will not know when Tesla's evidence
 24 and argument contradicts the first jury's binding liability determinations, a gap in information
 25 that will inevitably lead to confusion and inefficiency and perhaps an unjust verdict. For
 26 example, the prior jury necessarily determined that “Mr. Diaz perceived the working
 27 environment to be abusive or hostile.” Without this instruction, Tesla might try to argue that Mr.
 28 Diaz did not find the work environment hostile or abusive because he recommended that his son

1 and Lamar Patterson work there. If the jury is not instructed that the first jury necessarily
 2 determined, based on the instructions underlying the special verdict form, that “[a] reasonable
 3 African American man in Mr. Diaz’s circumstances would consider the working environment to
 4 be abusive or hostile,” Tesla would have an opening to argue, impermissibly, that the work
 5 environment was more a “friendly” atmosphere in light of Mr. Kawasaki’s testimony that at least
 6 some of the people seemed to be using the word that way.

7 **B. Defendant’s Position**

8 The Court should not give this instruction, or the others Mr. Diaz proposes, on the
 9 elements of the claims the first jury considered in determining liability. The Court has ruled that
 10 the retrial will be limited to damages only. The jury’s sole task, therefore, will be to determine
 11 the amount of compensatory damages, if any, that Mr. Diaz is entitled to and whether Mr. Diaz
 12 should be awarded punitive damages. The jury will be amply instructed on how to make those
 13 determinations. The parties are informing the jury of the findings the first jury made through
 14 their proposed special instruction no. 1 discussed above. There is no need to also instruct the
 15 jury on all the individual elements of the liability claims when the second jury will not be tasked
 16 with deciding whether those elements are met. The several liability instructions Mr. Diaz
 17 requests to include are lengthy and complex. Reading them to the jury will lead to confusion
 18 about whether the jury is required to apply those instructions and how they are relevant to its
 19 determination of damages. These instructions will also prejudice Tesla by effectively instructing
 20 the jury to make an independent determination of liability even though the Court has rejected
 21 Tesla’s request that the second jury actually decide liability anew.

22 Accordingly, the Court should decline to give this instruction and the other liability
 23 instructions Mr. Diaz proposes because they are not necessary or relevant. *See, e.g., Madrigal v.*
24 Allstate Ins. Co., 215 F. Supp. 3d 870, 918 (C.D. Cal. 2016), aff’d sub nom. Madrigal v. Allstate
25 Indem. Co., 697 F. App’x 905 (9th Cir. 2017) (“A court is not required to instruct the jury on
*26 matters irrelevant to the resolution of the dispute.”); *Helionetics, Inc. v. Paige & Assocs., Corp.,*
27 100 F.3d 962 (9th Cir. 1996) (affirming district court’s refusal to give instruction because it was
*28 “unnecessary”).**

[DISPUTED] JURY INSTRUCTION NO. 3.**TESLA'S RESPONSIBILITY FOR RACIAL HARASSMENT COMMITTED BY
MR. DIAZ'S SUPERVISORS AND
NON-IMMEDIATE SUPERVISORS OR CO-WORKERS****(Instruction Nos. 29, 30, and 32 in 1st Trial; modified and combined for retrial)**

It has also been conclusively determined that Tesla was an employer of Mr. Diaz and was liable to him because (1) one or more of Mr. Diaz's supervisors and one or more of his non-immediate supervisors or co-workers subjected Mr. Diaz to a hostile work environment based on his race, and (2) Tesla or a member of Tesla's management knew or should have known of the harassment and failed to take prompt, effective remedial action reasonably calculated to end the harassment.

A "supervisor" is a person who exercises immediate (or successively higher) authority over the employee. Whether someone is a supervisor does not depend upon job titles or formal structures within the workplace, but upon whether the person has the authority to demand obedience from an employee. An employer is liable for racial harassment committed by its supervisors.

A person is a "member of management" if the person has substantial authority and direction to make decisions concerning the terms of the harasser's employment or the plaintiff's employment, such as authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the plaintiff's employment. A person who lacks such authority is nevertheless part of management if he or she has an official or strong duty in fact to communicate to management complaints about work conditions.

For a defendant's remedial action to be prompt, effective, and reasonably calculated to end the harassment, it must be proportionate to the seriousness of the offense and effective in stopping the harasser from continuing to engage in the conduct and in discouraging other potential harassers from engaging in similar unlawful conduct.

1 The determination that Tesla is liable for the racial harassment committed by Mr. Diaz's
 2 non-immediate supervisors or co-workers means that any remedial action Tesla took was not
 3 reasonable, adequate, and proportionate to the seriousness of the offense.

4 **A. Plaintiff's Position**

5 Plaintiff proposes this instruction to accurately inform the retrial jury what the first jury
 6 actually determined in its liability findings in favor of Mr. Diaz. The special verdict form asked
 7 the first jury to determine whether Tesla was liable on each claim for relief, and expressly
 8 incorporated by reference the jury instructions that defined the terms and stated the required
 9 elements of each of those claims for relief. Tesla's opposition to this proposed jury instruction
 10 would eliminate the context of the liability finding, making it impossible for a retrial jury
 11 comprised of non-attorneys to understand what the liability jury necessarily found. The context
 12 of the conduct that caused Mr. Diaz's damages is important to determining the correct amount of
 13 compensatory and punitive damages. Unless the retrial jury is instructed, as the first jury was
 14 instructed, concerning the meaning of relevant terms and the elements that Mr. Diaz had to prove
 15 to establish liability, that retrial jury will have a legally inadequate understanding of which facts
 16 have been definitively established and which facts remain open to evidentiary dispute.

17 Instructing the retrial jury on the elements of the claims for which liability has been
 18 established is consistent with the approach taken by federal courts in California and elsewhere in
 19 damages retrials. See, e.g., *United States v. J-M Mfg. Co., Inc.*, 2018 WL 705532, at *7 (C.D.
 20 Cal. Jan. 31, 2018) ("[T]he scope of the Phase One jury's findings includes both the expressed
 21 findings of the jury, as well as those implied by the expressed findings. In making this
 22 assessment, the Court may look to the Verdict itself, the instructions presented to the jury, as
 23 well as the evidence proffered at the trial.") (citing, *inter alia*, *Los Angeles Police Protective
 24 League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993)).

25 Defendant's cited authority is not relevant to this case. *Madrigal* is procedurally
 26 distinguished, and its general statement that only relevant instructions should be given actually
 27 supports Plaintiff's position that the instruction explaining what the first jury determined on
 28 liability are necessary to the remaining issues. *Helionetics*, an unpublished opinion, also is

1 inapposite because it is procedurally distinct and merely stands for the principle that instructions
 2 that do not relate to evidence in the case are “unnecessary.” Here, the requested instructions are
 3 central to the case because they form the basis for the first jury’s decision and for the award of
 4 damages in the retrial.

5 Without the liability instructions, the retrial jury will not know when Tesla’s evidence
 6 and argument contradicts the first jury’s binding liability determinations, a gap in information
 7 that will inevitably lead to confusion and inefficiency and perhaps an unjust verdict. For
 8 example, this instruction includes definitions of “supervisor” and “manager” to help the jury
 9 understand the level of authority exercised by Tesla employees who participated in the
 10 harassment or who failed to stop the harassment from occurring, and would preclude Tesla from
 11 improperly arguing that certain supervisors and managers did not perform that function.

12 **B. Defendant’s Position**

13 The Court should not give this instruction, or the others Mr. Diaz proposes, on the
 14 elements of the claims the first jury considered in determining liability. The Court has ruled that
 15 the retrial will be limited to damages only. The jury’s sole task, therefore, will be to determine
 16 the amount of compensatory damages, if any, that Mr. Diaz is entitled to and whether Mr. Diaz
 17 should be awarded punitive damages. The jury will be amply instructed on how to make those
 18 determinations. The parties are informing the jury of the findings the first jury made through
 19 their proposed special instruction no. 1 discussed above. There is no need to also instruct the
 20 jury on all the individual elements of the liability claims when the second jury will not be tasked
 21 with deciding whether those elements are met. The several liability instructions Mr. Diaz
 22 requests to include are lengthy and complex. Reading them to the jury will lead to confusion
 23 about whether the jury is required to apply those instructions and how they are relevant to its
 24 determination of damages. These instructions will also prejudice Tesla by effectively instructing
 25 the jury to make an independent determination of liability even though the Court has rejected
 26 Tesla’s request that the second jury actually decide liability anew.

27 Accordingly, the Court should decline to give this instruction and the other liability
 28 instructions Mr. Diaz proposes because they are not necessary or relevant. *See, e.g., Madrigal v.*

1 *Allstate Ins. Co.*, 215 F. Supp. 3d 870, 918 (C.D. Cal. 2016), aff'd sub nom. *Madrigal v. Allstate*
2 *Indem. Co.*, 697 F. App'x 905 (9th Cir. 2017) ("A court is not required to instruct the jury on
3 matters irrelevant to the resolution of the dispute."); *Helionetics, Inc. v. Paige & Assocs., Corp.*,
4 100 F.3d 962 (9th Cir. 1996) (affirming district court's refusal to give instruction because it was
5 "unnecessary").

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[DISPUTED] JURY INSTRUCTION NO. 4.

LIABILITY FOR CIVIL RIGHTS VIOLATIONS

BASED ON CONTRACTUAL RELATIONSHIP

(Instruction No. 37 in 1st trial; modified for retrial)

Plaintiff asserts a section 1981 civil rights claim against Tesla, Inc. It has been conclusively determined that Tesla was liable to Mr. Diaz for violation of his civil rights because he was an employee or joint employee of Tesla, Inc. or, alternatively, that:

- (i) Plaintiff gained rights or was a beneficiary under a contract,
- (ii) Tesla engaged in racial discrimination or harassment in the enforcement of the contract, or failed to take reasonable step(s) to prevent harassment from occurring in the place; and
- (iii) Plaintiff suffered injuries that he would not have suffered but for the defendant's

A. Plaintiffs' Position

Plaintiff proposes this instruction to adequately inform the retrial jury what the first jury actually determined in its liability findings in favor of Mr. Diaz. The jury not only found liability based on a hostile work environment, but also liability based on a violation of Mr. Diaz's rights pursuant to one or both of Mr. Diaz's contract theories. The jury is entitled to consider the basis for the first jury's liability findings when awarding compensatory and punitive damages because it is bound by those findings.

The special verdict form asked the first jury to determine whether Tesla was liable on each claim for relief, and expressly incorporated by reference the jury instructions that defined the terms and stated the required elements of each of those claims for relief. Tesla’s request to exclude that critical information from this proposed jury instructions would eliminate the context for the first jury’s liability finding, making it impossible for a retrial jury comprised of non-attorneys to understand what the liability jury necessarily found. Unless the retrial jury is instructed, as the first jury was instructed, concerning the meaning of relevant terms and the

1 elements that Mr. Diaz had to prove to establish liability, that retrial jury will have a legally
 2 inadequate understanding of which facts have been definitively established and which facts
 3 remain open to evidentiary dispute.

4 Instructing the retrial jury on the elements of the claims for which liability has been
 5 established is consistent with the approach taken by federal courts in California and elsewhere in
 6 damages retrials. See, e.g., *United States v. J-M Mfg. Co., Inc.*, 2018 WL 705532, at *7 (C.D.
 7 Cal. Jan. 31, 2018) (“[T]he scope of the Phase One jury’s findings includes both the expressed
 8 findings of the jury, as well as those implied by the expressed findings. In making this
 9 assessment, the Court may look to the Verdict itself, the instructions presented to the jury, as
 10 well as the evidence proffered at the trial.”) (citing, *inter alia*, *Los Angeles Police Protective
 11 League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993)).

12 Defendant’s cited authority is not relevant to this case. *Madrigal* is procedurally
 13 distinguished, and its general statement that only relevant instructions should be given actually
 14 supports Plaintiff’s position that the instruction explaining what the first jury determined on
 15 liability are necessary to the remaining issues. *Helionetics*, an unpublished opinion, also is
 16 inapposite because it is procedurally distinct and merely stands for the principle that instructions
 17 that do not relate to evidence in the case are “unnecessary.” Here, the requested instructions are
 18 central to the case because they form the basis for the first jury’s decision and for the award of
 19 damages in the retrial.

20 Without the liability instructions, the retrial jury will not know when Tesla’s evidence
 21 and argument contradicts the first jury’s binding liability determinations, a gap in information
 22 that will inevitably lead to confusion and inefficiency and perhaps an unjust verdict.

23 **B. Defendant’s Position**

24 The Court should not give this instruction, or the others Mr. Diaz proposes, on the
 25 elements of the claims the first jury considered in determining liability. The Court has ruled that
 26 the retrial will be limited to damages only. The jury’s sole task, therefore, will be to determine
 27 the amount of compensatory damages, if any, that Mr. Diaz is entitled to and whether Mr. Diaz
 28 should be awarded punitive damages. The jury will be amply instructed on how to make those

1 determinations. The parties are informing the jury of the findings the first jury made through
2 their proposed special instruction no. 1 discussed above. There is no need to also instruct the
3 jury on all the individual elements of the liability claims when the second jury will not be tasked
4 with deciding whether those elements are met. The several liability instructions Mr. Diaz
5 requests to include are lengthy and complex. Reading them to the jury will lead to confusion
6 about whether the jury is required to apply those instructions and how they are relevant to its
7 determination of damages. These instructions will also prejudice Tesla by effectively instructing
8 the jury to make an independent determination of liability even though the Court has rejected
9 Tesla's request that the second jury actually decide liability anew.

10 Accordingly, the Court should decline to give this instruction and the other liability
11 instructions Mr. Diaz proposes because they are not necessary or relevant. *See, e.g., Madrigal v.*
12 *Allstate Ins. Co.*, 215 F. Supp. 3d 870, 918 (C.D. Cal. 2016), aff'd sub nom. *Madrigal v. Allstate*
13 *Indem. Co.*, 697 F. App'x 905 (9th Cir. 2017) ("A court is not required to instruct the jury on
14 matters irrelevant to the resolution of the dispute."); *Helionetics, Inc. v. Paige & Assocs., Corp.*,
15 100 F.3d 962 (9th Cir. 1996) (affirming district court's refusal to give instruction because it was
16 "unnecessary").

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[DISPUTED] JURY INSTRUCTION NO. 5.**FAILURE TO PREVENT RACIAL HARASSMENT****(Instruction No. 34 in 1st trial; modified for retrial)**

Because it has been conclusively determined that Tesla failed to prevent one or more of Mr. Diaz's supervisors and one or more of his non-immediate supervisors or co-workers from racially harassing Mr. Diaz, you are required to accept as true the following findings.

1. Mr. Diaz was subjected to racial harassment in the course of his employment by Tesla;
2. Tesla failed to take all reasonable steps to prevent the harassment;
3. Mr. Diaz was harmed by the harassment; and
4. Tesla's failure to take all reasonable steps to prevent the harassment was a substantial factor in causing Mr. Diaz to suffer harm.

A. Plaintiff's Position

Requested Instruction No. 5 specifically details the prior jury's finding of harm to Mr. Diaz, which should foreclose any argument by Defendant that he suffered nominal damages. (See below.) Plaintiff proposes this instruction to adequately inform the retrial jury what the first jury actually determined in its liability findings in favor of Mr. Diaz. The special verdict form asked the first jury to determine whether Tesla was liable on each claim for relief, and expressly incorporated by reference the jury instructions that defined the terms and stated the required elements of each of those claims for relief. Tesla's request to exclude this critical information would eliminate the context of the liability finding, making it impossible for a retrial jury comprised of non-attorneys to understand what the liability jury necessarily found. Unless the retrial jury is instructed, as the first jury was instructed, concerning the meaning of relevant terms and the elements that Mr. Diaz had to prove to establish liability, that retrial jury will have a legally inadequate understanding of which facts have been definitively established and which facts remain open to evidentiary dispute.

Instructing the retrial jury on the elements of the claims for which liability has been established is consistent with the approach taken by federal courts in California and elsewhere in

1 damages retrials. *See, e.g., United States v. J-M Mfg. Co., Inc.*, 2018 WL 705532, at *7 (C.D.
 2 Cal. Jan. 31, 2018) (“[T]he scope of the Phase One jury’s findings includes both the expressed
 3 findings of the jury, as well as those implied by the expressed findings. In making this
 4 assessment, the Court may look to the Verdict itself, the instructions presented to the jury, as
 5 well as the evidence proffered at the trial.”) (citing, *inter alia*, *Los Angeles Police Protective*
 6 *League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993)).

7 Defendant’s cited authority is not relevant to this case. *Madrigal* is procedurally
 8 distinguished, and its general statement that only relevant instructions should be given actually
 9 supports Plaintiff’s position that the instruction explaining what the first jury determined on
 10 liability are necessary to the remaining issues. *Helionetics*, an unpublished opinion, also is
 11 inapposite because it is procedurally distinct and merely stands for the principle that instructions
 12 that do not relate to evidence in the case are “unnecessary.” Here, the requested instructions are
 13 central to the case because they form the basis for the first jury’s decision and for the award of
 14 damages in the retrial.

15 Without the liability instructions, the retrial jury will not know when Tesla’s evidence
 16 and argument contradicts the first jury’s binding liability determinations, a gap in information
 17 that will inevitably lead to confusion and inefficiency and perhaps an unjust verdict.

18 With respect to the failure-to-prevent cause of action, it is imperative that the new jury
 19 understand that there has been a binding determination that Tesla failed to prevent the
 20 harassment of Mr. Diaz and that Mr. Diaz was *harmed* by the harassment (element 4) and by
 21 Tesla’s failure to prevent that harassment (element 5). If there is no instruction on this to the new
 22 jury, the retrial jury could be asked to speculate about causation, which is no longer at issue
 23 given the first jury’s findings. Contrary to Tesla’s position, this instruction is necessary to
 24 prevent speculation by the jury as to whether harm has been found or not and so the new jury
 25 does not speculate about liability.

26 **B. Defendant’s Position**

27 The Court should not give this instruction, or the others Mr. Diaz proposes, on the
 28 elements of the claims the first jury considered in determining liability. The Court has ruled that

1 the retrial will be limited to damages only. The jury's sole task, therefore, will be to determine
2 the amount of compensatory damages, if any, that Mr. Diaz is entitled to and whether Mr. Diaz
3 should be awarded punitive damages. The jury will be amply instructed on how to make those
4 determinations. The parties are informing the jury of the findings the first jury made through
5 their proposed special instruction no. 1 discussed above. There is no need to also instruct the
6 jury on all the individual elements of the liability claims when the second jury will not be tasked
7 with deciding whether those elements are met. The several liability instructions Mr. Diaz
8 requests to include are lengthy and complex. Reading them to the jury will lead to confusion
9 about whether the jury is required to apply those instructions and how they are relevant to its
10 determination of damages. These instructions will also prejudice Tesla by effectively instructing
11 the jury to make an independent determination of liability even though the Court has rejected
12 Tesla's request that the second jury actually decide liability anew.

13 Accordingly, the Court should decline to give this instruction and the other liability
14 instructions Mr. Diaz proposes because they are not necessary or relevant. *See, e.g., Madrigal v.*
15 *Allstate Ins. Co.*, 215 F. Supp. 3d 870, 918 (C.D. Cal. 2016), aff'd sub nom. *Madrigal v. Allstate*
16 *Indem. Co.*, 697 F. App'x 905 (9th Cir. 2017) ("A court is not required to instruct the jury on
17 matters irrelevant to the resolution of the dispute."); *Helionetics, Inc. v. Paige & Assocs., Corp.*,
18 100 F.3d 962 (9th Cir. 1996) (affirming district court's refusal to give instruction because it was
19 "unnecessary").

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[DISPUTED] JURY INSTRUCTION NO. 6.

NEGLIGENT SUPERVISION OR CONTINUED EMPLOYMENT

(Instruction No. 35 in 1st trial; modified for retrial)

Because it has been conclusively determined that Owen Diaz was harmed by Ramon Martinez and that Tesla is responsible for that harm because Tesla negligently supervised or continued to employ Ramon Martinez, you are required to accept as true the following findings:

1. Tesla employed Ramon Martinez during the time that Mr. Diaz worked at Tesla;
2. Ramon Martinez was or became unfit or incompetent to perform the work for which he was employed;
3. Tesla knew or should have known that Ramon Martinez was or became unfit or incompetent and that this unfitness or incompetence created a particular risk to others;
4. After Tesla knew or should have known of Ramon Martinez's unfitness or incompetence, it retained or supervised Ramon Martinez in his position at Tesla's factory;
5. Ramon Martinez's unfitness or incompetence harmed Mr. Diaz; and
6. Tesla's negligence in supervising or retaining Ramon Martinez was a substantial factor in causing Mr. Diaz's harm.

A. Plaintiff's Position

Requested Instruction No. 6 makes clear that there has already been a binding determination that Tesla's wrongful conduct caused actionable harm to Mr. Diaz, and is essential to foreclose Tesla's apparent intent to argue that Mr. Diaz did not suffer any harm and is therefore entitled to nominal damages only (See below.) Plaintiff proposes this instruction to adequately inform the retrial jury what the first jury actually determined in its liability findings in favor of Mr. Diaz. The special verdict form asked the first jury to determine whether Tesla was liable on each claim for relief, and expressly incorporated by reference the jury instructions that defined the terms and stated the required elements of each of those claims for relief. Tesla's request not to include this proposed jury instructions would eliminate the context of the liability finding, making it impossible for a retrial jury comprised of non-attorneys to understand what the

1 liability jury necessarily found. Unless the retrial jury is instructed, as the first jury was
 2 instructed, concerning the meaning of relevant terms and the elements that Mr. Diaz had to prove
 3 to establish liability, that retrial jury will have a legally inadequate understanding of which facts
 4 have been definitively established and which facts remain open to evidentiary dispute.

5 Instructing the retrial jury on the elements of the claims for which liability has been
 6 established is consistent with the approach taken by federal courts in California and elsewhere in
 7 damages retrials. See, e.g., *United States v. J-M Mfg. Co., Inc.*, 2018 WL 705532, at *7 (C.D.
 8 Cal. Jan. 31, 2018) (“[T]he scope of the Phase One jury’s findings includes both the expressed
 9 findings of the jury, as well as those implied by the expressed findings. In making this
 10 assessment, the Court may look to the Verdict itself, the instructions presented to the jury, as
 11 well as the evidence proffered at the trial.”) (citing, *inter alia*, *Los Angeles Police Protective*
 12 *League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993)).

13 Defendant’s cited authority is not relevant to this case. *Madrigal* is procedurally
 14 distinguishable, and its general statement that only relevant instructions should be given actually
 15 supports Mr. Diaz’s position that the instruction explaining what the first jury determined on
 16 liability are necessary to the remaining issues. *Helionetics*, an unpublished opinion, is inapposite
 17 because it is procedurally distinct and merely stands for the principle that instructions that do not
 18 relate to evidence in the case are “unnecessary.” Here, the requested instructions are central to
 19 the case because they form the basis for the first jury’s decision and for the award of damages in
 20 the retrial.

21 Without the liability instructions, the retrial jury will not know when Tesla’s evidence
 22 and argument contradicts the first jury’s binding liability determinations, a gap in information
 23 that will inevitably lead to confusion and inefficiency and perhaps an unjust verdict.

24 **B. Defendant’s Position**

25 The Court should not give this instruction, or the others Mr. Diaz proposes, on the
 26 elements of the claims the first jury considered in determining liability. The Court has ruled that
 27 the retrial will be limited to damages only. The jury’s sole task, therefore, will be to determine
 28 the amount of compensatory damages, if any, that Mr. Diaz is entitled to and whether Mr. Diaz

1 should be awarded punitive damages. The jury will be amply instructed on how to make those
2 determinations. The parties are informing the jury of the findings the first jury made through
3 their proposed special instruction no. 1 discussed above. There is no need to also instruct the
4 jury on all the individual elements of the liability claims when the second jury will not be tasked
5 with deciding whether those elements are met. The several liability instructions Mr. Diaz
6 requests to include are lengthy and complex. Reading them to the jury will lead to confusion
7 about whether the jury is required to apply those instructions and how they are relevant to its
8 determination of damages. These instructions will also prejudice Tesla by effectively instructing
9 the jury to make an independent determination of liability even though the Court has rejected
10 Tesla's request that the second jury actually decide liability anew.

11 Accordingly, the Court should decline to give this instruction and the other liability
12 instructions Mr. Diaz proposes because they are not necessary or relevant. *See, e.g., Madrigal v.*
13 *Allstate Ins. Co.*, 215 F. Supp. 3d 870, 918 (C.D. Cal. 2016), aff'd sub nom. *Madrigal v. Allstate*
14 *Indem. Co.*, 697 F. App'x 905 (9th Cir. 2017) ("A court is not required to instruct the jury on
15 matters irrelevant to the resolution of the dispute."); *Helionetics, Inc. v. Paige & Assocs., Corp.*,
16 100 F.3d 962 (9th Cir. 1996) (affirming district court's refusal to give instruction because it was
17 "unnecessary").

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1 **[DISPUTED] JURY INSTRUCTION NO. 7.**2 **EMPLOYER'S DUTY TO INVESTIGATE AND TAKE REMEDIAL ACTION**3 **(Instruction No. 33 in 1st trial)**

5 Employers must take all reasonable steps necessary to prevent harassment from
 6 occurring. When an employer becomes aware of potentially harassing conduct, it has a duty to
 7 promptly investigate and to take immediate and effective corrective action should it determine
 8 that harassment has occurred. Remedial measures need to include immediate corrective action
 9 that is reasonably calculated to 1) end the current harassment and 2) to deter future harassment.
 10 The remedial actions must be designed, in part, to deter future harassment by the same offender
 11 or others.

12 Some of the steps employers can take to prevent harassment from occurring include such
 13 things as affirmatively raising the subject, expressing strong disapproval, conducting a timely,
 14 thorough, good faith investigation of allegations of harassment of which the Defendant knew or
 15 had reason to know, developing appropriate sanctions, informing employees of their right to
 16 raise and how to raise the issue of harassment under federal law, and developing methods to
 17 sensitize all concerned.

18 **A. Plaintiff's Position**

19 This instruction in particular is important because it enables the retrial jury to assess
 20 Tesla's punitive damages liability in the context of the failure to prevent cause of action. Tesla's
 21 liability for that claim for relief needs context as to what measures a reasonable employer are
 22 supposed to take, and Tesla's decision not to take those measures is reprehensible. Plaintiff
 23 proposes this instruction to adequately inform the retrial jury what the first jury actually
 24 determined in its liability findings in favor of Mr. Diaz. The jury not only found liability based
 25 on a hostile work environment, but also liability based on a violation of Mr. Diaz's rights
 26 pursuant to Mr. Diaz's contract theory. The jury is entitled to consider that when awarding
 27 compensatory and punitive damages. The special verdict form asked the first jury to determine
 28 whether Tesla was liable on each claim for relief, and expressly incorporated by reference the

1 jury instructions that defined the terms and stated the required elements of each of those claims
 2 for relief. Tesla's request not to include this proposed jury instructions would eliminate the
 3 context of the liability finding, making it impossible for a retrial jury comprised of non-attorneys
 4 to understand what the liability jury necessarily found. Unless the retrial jury is instructed, as the
 5 first jury was instructed, concerning the meaning of relevant terms and the elements that Mr.
 6 Diaz had to prove to establish liability, that retrial jury will have a legally inadequate
 7 understanding of which facts have been definitively established and which facts remain open to
 8 evidentiary dispute.

9 Instructing the retrial jury on the elements of the claims for which liability has been
 10 established is consistent with the approach taken by federal courts in California and elsewhere in
 11 damages retrials. See, e.g., *United States v. J-M Mfg. Co., Inc.*, 2018 WL 705532, at *7 (C.D.
 12 Cal. Jan. 31, 2018) (“[T]he scope of the Phase One jury’s findings includes both the expressed
 13 findings of the jury, as well as those implied by the expressed findings. In making this
 14 assessment, the Court may look to the Verdict itself, the instructions presented to the jury, as
 15 well as the evidence proffered at the trial.”) (citing, *inter alia*, *Los Angeles Police Protective
 16 League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993)).

17 Defendant’s cited authority is not relevant to this case. *Madrigal* is procedurally
 18 distinguished, and its general statement that only relevant instructions should be given actually
 19 supports Plaintiff’s position that the instruction explaining what the first jury determined on
 20 liability are necessary to the remaining issues. *Helionetics*, an unpublished opinion, also is
 21 inapposite because it is procedurally distinct and merely stands for the principle that instructions
 22 that do not relate to evidence in the case are “unnecessary.” Here, the requested instructions are
 23 central to the case because they form the basis for the first jury’s decision and for the award of
 24 damages in the retrial.

25 Without the liability instructions, the retrial jury will not know when Tesla’s evidence
 26 and argument contradicts the first jury’s binding liability determinations, a gap in information
 27 that will inevitably lead to confusion and inefficiency and perhaps an unjust verdict.

28 **B. Defendant’s Position**

1 The Court should not give this instruction, or the others Mr. Diaz proposes, on the
2 elements of the claims the first jury considered in determining liability. The Court has ruled that
3 the retrial will be limited to damages only. The jury's sole task, therefore, will be to determine
4 the amount of compensatory damages, if any, that Mr. Diaz is entitled to and whether Mr. Diaz
5 should be awarded punitive damages. The jury will be amply instructed on how to make those
6 determinations. The parties are informing the jury of the findings the first jury made through
7 their proposed special instruction no. 1 discussed above. There is no need to also instruct the
8 jury on all the individual elements of the liability claims when the second jury will not be tasked
9 with deciding whether those elements are met. The several liability instructions Mr. Diaz
10 requests to include are lengthy and complex. Reading them to the jury will lead to confusion
11 about whether the jury is required to apply those instructions and how they are relevant to its
12 determination of damages. These instructions will also prejudice Tesla by effectively instructing
13 the jury to make an independent determination of liability even though the Court has rejected
14 Tesla's request that the second jury actually decide liability anew.

15 Accordingly, the Court should decline to give this instruction and the other liability
16 instructions Mr. Diaz proposes because they are not necessary or relevant. *See, e.g., Madrigal v.*
17 *Allstate Ins. Co.*, 215 F. Supp. 3d 870, 918 (C.D. Cal. 2016), aff'd sub nom. *Madrigal v. Allstate*
18 *Indem. Co.*, 697 F. App'x 905 (9th Cir. 2017) ("A court is not required to instruct the jury on
19 matters irrelevant to the resolution of the dispute."); *Helionetics, Inc. v. Paige & Assocs., Corp.*,
20 100 F.3d 962 (9th Cir. 1996) (affirming district court's refusal to give instruction because it was
21 "unnecessary").

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[DISPUTED] JURY INSTRUCTION NO 8.

DAMAGES—PROOF

(Instruction No. 38 in 1st trial; modified for retrial)

A. Plaintiff's Proposed Version Of Instruction

It has also been conclusively determined that Tesla's violations of plaintiff Owen Diaz's rights caused Mr. Diaz to suffer past and future harm. Your role is to determine the amount of money that will reasonably and fairly compensate Mr. Diaz for that past and future harm.

The plaintiff, Owen Diaz, has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for the harm caused by the defendant.

In determining the measure of damages, you should consider the following:

The nature and extent of the harm;

The loss of enjoyment of life Mr. Diaz experienced and that with reasonable probability he will experience in the future;

The mental or emotional pain and suffering Mr. Diaz experienced and that with reasonable he will experience in the future;

It is for you to determine what damages have been proved. Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

B. Defendant's Proposed Version Of Instruction

— It has further been conclusively determined that Tesla's violations of plaintiff Owen Diaz's rights caused Mr. Diaz to suffer past and future harm. Your role is to determine the amount of money that will reasonably and fairly compensate Mr. Diaz for that past and future harm.

~~The plaintiff, Owen~~ Mr. Diaz, has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate ~~the plaintiff~~ Mr. Diaz for the harm caused by ~~the defendant~~ Tesla.

In determining the measure of damages, you should consider the following:

1 1. The nature and extent of the ~~harm~~injuries actually suffered by Mr. Diaz;

2 2. The loss of enjoyment of life experienced and that with reasonable probability

3 will be experienced in the future;

4 3. The mental or emotional pain and suffering experienced and that with reasonable
5 probability will be experienced in the future;

6 It is for you to determine what damages, if any, have been proved. Your award must be
7 based upon evidence and not upon speculation, guesswork or conjecture.

8 **C. Plaintiff's Position In Support Of His Proposed Version Of Instruction**

9 Nominal damages are simply not available in this retrial contrary to what Tesla contends.

10 “The Supreme Court has held that entitlement to compensatory damages in a civil rights action is
11 not a matter of discretion: ‘Compensatory damages ... are mandatory; once liability is found, the
12 jury is required to award compensatory damages in an amount appropriate to compensate the
13 plaintiff for his loss.’ *Smith v. Wade*, 461 U.S. 30, 52, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983)
14 (emphasis added).” *Hazle v. Crofoot*, 727 F.3d 983, 992 (9th Cir. 2013). In *Hazle*, the district
15 court ruled that a violation of the plaintiff’s civil rights occurred, but the jury awarded zero
16 damages and the plaintiff sought a new trial. The Ninth Circuit held that “[g]iven this undisputed
17 finding that Hazle’s constitutional rights were violated, and applying the rule that the award of
18 compensatory damages is mandatory when the existence of actual injury is beyond dispute, we
19 hold that the district judge erred in refusing to hold that Hazle was, as a matter of law, entitled to
20 compensatory damages.” *Id.* at pp.991-992.

21 The first jury determined with respect to failure to prevent harassment claim that Tesla’s
22 failure to prevent harassment “was a substantial factor in causing Mr. Diaz’s harm” (Instruction
23 No. 34) and that Tesla’s negligent retention of Mr. Martinez “was a substantial factor in causing
24 Owen Diaz’s harm” (Instruction 35). These factual determinations by the first jury, as to both the
25 federal and the state claims for relief, preclude the retrial jury from finding that Mr. Diaz
26 suffered no harm and is thus only entitled to nominal damages. Therefore, the “if any” language
27 is inappropriate on retrial.

28 **D. Defendant’s Position In Support Of Its Proposed Version Of Instruction**

1 Tesla proposes to revise Mr. Diaz's proposed version of this instruction so that it more
 2 closely tracks the damages instruction given in the first trial (Dkt. 280 at 39). Tesla also
 3 proposes to clarify that the "injuries" the jury must consider in determining damages are injuries
 4 that Mr. Diaz actually suffered (as opposed to injuries or harm to third parties).

5 Mr. Diaz also omitted the words "if any" from the instruction as given before, without
 6 any basis for doing so. Like the first jury, the second jury is entitled to award no compensatory
 7 damages to Mr. Diaz, or nominal compensatory damages. Nothing about the first jury's finding
 8 of Tesla's liability for creating a hostile work environment that will apply on the retrial requires
 9 the second jury to award any amount of compensatory damages. Rather, Mr. Diaz still needs to
 10 prove such damages by a preponderance of the evidence. *See, e.g.*, Ninth Circuit Model Civil
 11 Jury Instruction 5.1 (recognizing preponderance of the evidence standard for proving damages);
 12 *Vazquez v. Caesar's Paradise Stream Resort*, 2013 WL 6244568, at *7-8 (M.D. Pa. Dec. 3,
 13 2013) ("[Plaintiff] had the burden of proving these damages by a preponderance of the evidence
 14 ... to recover compensatory damages under § 1981"); *Irish v. Jewel Food Stores, Inc.*, 2012 WL
 15 619555, at *7-9 (N.D. Ill. Feb. 23, 2012) ("Plaintiff ... must prove his damages by a
 16 preponderance of the evidence" for § 1981 hostile work environment claim).

17 Thus, notwithstanding the first jury's finding of liability, the second jury remains entitled
 18 to award Mr. Diaz nominal damages if Mr. Diaz fails to prove his compensatory damages by a
 19 preponderance of the evidence. *See, e.g.*, *Guy v. City of San Diego*, 608 F.3d 582, 588 (9th Cir.
 20 2010) (affirming denial of new trial on damages where jury awarded nominal damages despite
 21 finding that defendant used excessive force and that plaintiff was injured, because jury was free
 22 to find that injury resulted from other than the defendant's excessive use of force); *Bains LLC v.*
 23 *Arco Prod. Co., Div. of Atl. Richfield Co.*, 405 F.3d 764, 772 (9th Cir. 2005) ("An award of
 24 nominal damages does not mean that there were not actual economic damages, just that the exact
 25 amount of damages attributable to the improper conduct was not proven. The court instructed
 26 the jury to award nominal damages if it found that ARCO had harmed Flying B in violation of §
 27 1981, but that Flying B failed to prove damages as defined in these instructions. And that is
 28 exactly what the jury did."); *Brocade Communications Systems, Inc. v. A10 Networks, Inc.*, 2013
 WL 831528, at *23 (N.D. Cal. Jan 10, 2013) ("Although small in amount, a nominal damages

1 award still reflects the jury's finding that all of the elements of the claim have been met to
2 establish liability."). Accordingly, it is appropriate to instruct the jury that it may find Mr. Diaz
3 is not entitled to "any" amount of compensatory damages.

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1 [DISPUTED] JURY INSTRUCTION NO 9.

2 NOMINAL DAMAGES

3 (Instruction No. 41 in 1st trial)

5 The law that applies to this case authorizes an award of nominal damages. If you find
 6 that Mr. Diaz has failed to prove damages as defined in these instructions, you must award
 7 nominal damages. Nominal damages may not exceed one dollar.

8 A. Plaintiff's Position

9 Nominal damages are simply not available in this retrial contrary to what Defendant
 10 contends. "The Supreme Court has held that entitlement to compensatory damages in a civil
 11 rights action is not a matter of discretion: 'Compensatory damages ... are mandatory; once
 12 liability is found, the jury is required to award compensatory damages in an amount appropriate
 13 to compensate the plaintiff for his loss.' *Smith v. Wade*, 461 U.S. 30, 52, 103 S.Ct. 1625, 75
 14 L.Ed.2d 632 (1983) (emphasis added)." *Hazle v. Crofoot*, 727 F.3d 983, 992 (9th Cir. 2013). In
 15 *Hazle*, the district court ruled that a violation of the plaintiff's civil rights occurred, but the jury
 16 awarded zero damages and the plaintiff sought a new trial. The Ninth Circuit held that "[g]iven
 17 this undisputed finding that Hazle's constitutional rights were violated, and applying the rule that
 18 the award of compensatory damages is mandatory when the existence of actual injury is beyond
 19 dispute, we hold that the district judge erred in refusing to hold that Hazle was, as a matter of
 20 law, entitled to compensatory damages." *Id.* at pp.991-992.

21 There is no evidence upon which the second jury could find that Owen Diaz suffered no
 22 harm as the result of Tesla's wrongful conduct, and the first jury has definitively found that
 23 Tesla's wrongful conduct caused resulting hard, Nominal damages are only appropriate in cases
 24 where a defendant engages in wrongful conduct that causes no quantifiable harm. In the first
 25 trial, the testimony was overwhelming that the challenged conduct (for example, the racist
 26 drawing from January 2016) caused Mr. Diaz to suffer emotional distress, and the Court's Post-
 27 Trial Orders confirmed that substantial evidence supported the fact of injury, although the Court
 28 proposed a remittitur to \$1.5 million for those emotional distress damages.

1 The first jury determined with respect to failure to prevent harassment claim that Tesla's
 2 failure to prevent harassment "was a substantial factor in causing Mr. Diaz's harm" (Instruction
 3 No. 34) and that Tesla's negligent retention of Mr. Martinez "was a substantial factor in causing
 4 Owen Diaz's harm" (Instruction 35). These factual determinations by the first jury prevent and
 5 award of nominal damages. Therefore, this nominal damages language is inappropriate on retrial.

6 **B. Defendant's Position**

7 The Court gave this instruction in the first trial and should do so again. Simply because
 8 the first jury has already found liability does not mean that the second jury may not award
 9 nominal damages if it determines that Mr. Diaz has not proven any amount of compensatory
 10 damages by a preponderance of the evidence. *See, e.g., Guy v. City of San Diego*, 608 F.3d 582,
 11 588 (9th Cir. 2010) (affirming denial of new trial on damages where jury awarded nominal
 12 damages despite finding that defendant used excessive force and that plaintiff was injured,
 13 because jury was free to find that injury resulted from other than the defendant's excessive use of
 14 force); *Bains LLC v. Arco Prod. Co., Div. of Atl. Richfield Co.*, 405 F.3d 764, 772 (9th Cir. 2005)
 15 ("An award of nominal damages does not mean that there were not actual economic damages,
 16 just that the exact amount of damages attributable to the improper conduct was not proven. The
 17 court instructed the jury to award nominal damages if it found that ARCO had harmed Flying B
 18 in violation of § 1981, but that Flying B failed to prove damages as defined in these instructions.
 19 And that is exactly what the jury did."); *Brocade Communications Systems, Inc. v. A10*
 20 *Networks, Inc.*, 2013 WL 831528, at *23 (N.D. Cal. Jan 10, 2013) ("Although small in amount, a
 21 nominal damages award still reflects the jury's finding that all of the elements of the claim have
 22 been met to establish liability."); *see also, e.g.*, Ninth Circuit Model Civil Jury Instruction 5.1
 23 (recognizing preponderance of the evidence standard for proving damages); *Vazquez v. Caesar's*
 24 *Paradise Stream Resort*, 2013 WL 6244568, at *7-8 (M.D. Pa. Dec. 3, 2013) ("[Plaintiff] had the
 25 burden of proving these damages by a preponderance of the evidence to recover
 26 compensatory damages under § 1981"); *Irish v. Jewel Food Stores, Inc.*, 2012 WL 619555, at
 27 *7-9 (N.D. Ill. Feb. 23, 2012) ("Plaintiff . . . must prove his damages by a preponderance of the
 28 evidence" for § 1981 hostile work environment claim).

1 Indeed, in all cases, a jury must determine liability before assessing whether to award
2 damages and in what amount. The situation is no different here simply because the liability
3 finding was made in a prior trial. Mr. Diaz should not be permitted to cherry pick certain
4 damages instructions he believes are unfavorable for him and ask that they be excluded from the
5 retrial.

6 Nor is it relevant that the Court determined that substantial evidence supported the first
7 jury's finding that there was a basis to award some amount of compensatory damages. The
8 Court made that ruling in the context of Tesla's Motion for Judgment as a Matter of Law, New
9 Trial and/or Remittitur Pursuant to Federal Rules of Civil Procedure 50 and 59 (Dkt. 317). If
10 Mr. Diaz wanted to benefit from that ruling, then he should have accepted the Court's remittitur
11 of the compensatory damages to the amount the Court determined was the maximum sustainable
12 by the proof. But Mr. Diaz rejected the remittitur and elected a new trial on damages. In so
13 doing, he chose to restart the damages inquiry. The second jury is therefore not bound by any
14 prior jury finding regarding any amount of compensatory damages.

15 For these reasons, it is erroneous for Mr. Diaz to seek to exclude this instruction. *See*
16 *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007) ("Where a proposed
17 instruction is supported by law and not adequately covered by other instructions, the court should
18 give a non-misleading instruction that captures the substance of the proposed instruction."
19 (emphasis omitted)); *United States v. Unruh*, 855 F.2d 1363, 1372 (9th Cir. 1987) ("[T]he failure
20 to give a requested instruction is reversible error if the defendant's theory of the case is
21 supported by law and has some foundation in the evidence.").

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1 **[DISPUTED] JURY INSTRUCTION NO 10.**2 **DAMAGES—MITIGATION**3 **(Instruction No. 39 in 1st Trial)**

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5 Mr. Diaz has a duty to use reasonable efforts to mitigate damages. To mitigate means to
6 avoid or reduce damages.

7 Tesla has the burden of proving by a preponderance of the evidence:

8 1. that Mr. Diaz failed to use reasonable efforts to mitigate damages; and
9 2. the amount by which damages could have been mitigated.10 **A. Plaintiff's Position**11 Plaintiff objects to this instruction. There was absolutely no evidence presented in the
12 first trial that Mr. Diaz somehow failed to mitigate his emotional distress damages. Nor, given
13 the limitations on the permissible scope of retrial, will there be any such evidence on retrial.
14 Because the scope of evidence in the second trial cannot exceed that of the first, there is no
15 evidentiary basis for a mitigation instruction. This is just a naked attempt by Tesla's new counsel
16 to argue the case differently from their predecessors – but the arguments of counsel need to be
17 tethered to the evidence,18 **B. Defendant's Position**19 The Court gave this instruction in the first trial and should do so again. Simply because
20 the first jury has already found liability does not mean that the second jury may no longer find
21 that Mr. Diaz failed to mitigate his damages, such as by failing to promptly and adequately make
22 his complaints, by continuing to work for Tesla (and encourage others to work there)
23 notwithstanding the racial discrimination he allegedly suffered, or by failing to seek prompt or
24 sufficient medical support for his alleged emotional distress. There is no reason why Mr. Diaz's
25 duty to mitigate would apply in the first trial to the jury's determination of damages but not in
26 the second trial.27 Mr. Diaz is wrong to rely on the supposed evidence in the first trial as a basis to resist this
28 instruction on a damages issue in the second trial. Even assuming there was no evidence to

1 support a “failure to mitigate” defense in the first trial—which Tesla disputes—Mr. Diaz elected
2 to restart the damages inquiry by rejecting the Court’s remittitur. Mr. Diaz has therefore
3 reassumed his burden to prove recoverable damages, and Tesla is entitled to reassert its defenses
4 to his damages claim. Mr. Diaz should not be permitted to cherry pick certain damages
5 instructions he believes are unfavorable for him and ask that they be excluded from the retrial.

6 For these reasons, it is erroneous for Mr. Diaz to seek to exclude this instruction. *See*
7 *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007) (“Where a proposed
8 instruction is supported by law and not adequately covered by other instructions, the court should
9 give a non-misleading instruction that captures the substance of the proposed instruction.”)
10 (emphasis omitted)); *United States v. Unruh*, 855 F.2d 1363, 1372 (9th Cir. 1987) (“[T]he failure
11 to give a requested instruction is reversible error if the defendant’s theory of the case is
12 supported by law and has some foundation in the evidence.”).

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[DISPUTED] JURY INSTRUCTION NO 11.

PUNITIVE DAMAGES

(Instruction No. 40 in 1st trial; modified for retrial)

A. Plaintiff's Proposed Version Of Instruction

It has also been conclusively determined that Tesla's conduct in subjecting Mr. Diaz to a racially hostile work environment and/or failing to take all reasonable steps necessary to prevent Mr. Diaz from being subject to racial harassment was malicious, oppressive, or in reckless disregard of Mr. Diaz's rights, and not merely negligent.

Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff.

Your role is to award the appropriate amount of punitive damages necessary to punish Tesla and to deter similar acts in the future. Punitive damages should be awarded based on the following conduct: creating a hostile work environment based on race, violating civil rights in a contractual relationship, and/or failing to prevent harassment based on race in the workplace.

The plaintiff has the burden of proving by a preponderance of the evidence the amount of punitive damages that should be awarded.

You must use reason in setting the amount of punitive damages. Punitive damages should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of punitive damages, consider the degree of reprehensibility of the defendant's conduct, including whether the conduct that harmed the plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial

1 risk of harm to people who are not parties to this case. You may not, however, set the amount of
 2 any punitive damages in order to punish the defendant for harm to anyone other than the plaintiff
 3 in this case. The proper purpose of punitive damages is not to compensate the plaintiff, but to
 4 punish the defendant and to deter the defendant from such conduct in the future.

5 **B. Defendant's Proposed Version Of Instruction**

6 Tesla proposes the following revisions to the punitive damages instruction as given at the
 7 first trial (changes from that instruction are tracked in redline below):

9 ~~If you find for the plaintiff,~~ You may, but are not required to, award punitive damages.

10 The purposes of punitive damages are to punish a defendant and to deter similar acts in the
 11 future. Punitive damages may not be awarded to compensate a plaintiff.

12 ~~The plaintiff Mr. Diaz~~ has the burden of proving by a preponderance of the evidence that
 13 punitive damages should be awarded based on his hostile work environment claim or failure to
 14 prevent harassment claim and, if so, the amount of any such damages.

15 You may award punitive damages only if you find that ~~defendant's Tesla's~~ conduct that
 16 harmed ~~the plaintiff Mr. Diaz~~ was malicious, oppressive or in reckless disregard of ~~the plaintiff~~
 17 Mr. Diaz' rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the
 18 purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under
 19 the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the
 20 defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights
 21 under federal law. An act or omission is oppressive if the defendant injures or damages or
 22 otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by
 23 misusing or abusing authority or power or by taking advantage of some weakness or disability or
 24 misfortune of the plaintiff. It is not sufficient that you find ~~defendant's Tesla's~~ conduct to be
 25 only negligent.

26 If you find that punitive damages are appropriate, you must use reason in setting the
 27 amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but
 28 should not reflect bias, prejudice or sympathy toward any party. In considering the amount of

1 any punitive damages, consider the degree of reprehensibility of ~~defendant's~~ Tesla's conduct;
 2 ~~including whether the conduct that harmed the plaintiff was particularly reprehensible because it~~
 3 ~~also caused actual harm or posed a substantial risk of harm to people who are not parties to this~~
 4 ~~case.~~ You may not, however, set the amount of any punitive damages in order to punish
 5 ~~defendant's~~ Tesla for harm to anyone other than the plaintiff in this case.

6 Punitive damages may be awarded even if you award ~~the plaintiff~~ Mr. Diaz only nominal,
 7 and not compensatory, damages.

8 **C. Plaintiff's Position In Support Of His Version Of Instruction**

9 **A. Introduction**

10 By asking this Court to reopen the issue of its liability for punitive damages, Tesla is
 11 once again improperly seeking reconsideration of a prior Court order that the parties *and* the
 12 Court have consistently relied upon for nearly ten months. Fundamental considerations of
 13 fairness require the Court to reject Tesla's last-minute stratagem.

14 From shortly after the Court's issuance of its April 22, 2022 Order on Post-Trial Motions,
 15 through the litigation over *Gasoline Products* and the past several months of pre-trial document
 16 exchanges and meet and confer sessions, the parties have been in full agreement that the
 17 upcoming damages-only retrial would be limited to determining the *amount* of compensatory and
 18 punitive damages that Tesla must pay Owen Diaz, not whether Tesla was *liable* to pay
 19 compensatory or punitive damages.

20 On February 6, 2023, despite having repeatedly confirmed that understanding of the
 21 Court's prior rulings (including in its draft jury instructions and statement of the case that Tesla
 22 lodged with the Court, Dkt. 374, 374-1, and 374-2), Tesla completely flipped its position,
 23 asserting for the first time that the prior jury's finding that Tesla was liable for punitive damages
 24 should have no binding effect on the damages-only retrial. In an email sent to Mr. Diaz's
 25 counsel, Tesla thus wrote: "[U]pon further review of the Court's order on Tesla's motion for a
 26 new trial on liability and damages and the language of your proposed instructions, we have made
 27 revisions to proposed disputed instruction nos. 1 and 11 to reflect that the jury on the retrial will
 28 make an independent determination about whether the conduct at issue was 'malicious,
 oppressive or in reckless disregard of the plaintiff's rights.' (Dkt. 365 at 13.) We also have

1 revised our joint statement of the case accordingly, and added to our proposed verdict form the
 2 question on this issue that was read to the first jury.”

3 Tesla’s reversal of position seeks to change everything, including the jury instructions,
 4 statement of the case, verdict form, and motions *in limine* – all of which were predicated on the
 5 parties’ *joint* understanding and agreement that the damages jury would be bound by the first
 6 jury’s findings that Tesla acted with malice, oppression, or in reckless disregard of Mr. Diaz’s
 7 Section 1981 rights. Tesla’s newly revised pretrial documents proceed from the mistaken
 8 assumption that the damages jury should be asked to decide *whether* Mr. Diaz is entitled to
 9 punitive damages before even considering the appropriate *amount* of those punitive damages.
 10 Yet Tesla has once again failed to comply with the Court’s required procedures, as it not only
 11 failed to seek reconsideration of the Court’s prior ruling but it has still not presented any legal
 12 authority justifying its procedurally improper, untimely, and prejudicial attempt to circumvent
 13 the Court’s orders rejecting its previous motion for a new trial on liability.

B. Argument

14 1. The Court’s Post-Trial Orders Repeatedly and Consistently State that the Retrial is
 15 About Only the *Amount* of Compensatory and Punitive Damages, Not *Liability* for
 16 Such Damages.

17 On December 7, 2022, when the Court informed the parties that it was denying Tesla’s
 18 second motion for a new trial on liability, the Court stated it was “really troubled” by Tesla’s
 19 “concealed heads, I win/tails, Plaintiff loses” strategy in resting its motion on a theory it did not
 20 raise in its prior new trial motion. The Court informed Tesla that its renewed motion was
 21 foreclosed by judicial estoppel and is “merely a disguised attempt” to have the Court reconsider
 22 that prior motion for a new trial on liability, which the Court had denied. (12/7/22 Transcript at
 23 4.)

24 Despite this strong admonition, Tesla is once again backpedaling from a prior position
 25 after leading Mr. Diaz and the Court astray for months. What Tesla characterizes as its “further
 26 review” of the Court’s December 12, 2022 order denying its motion for retrial on liability is just
 27 another disguised effort to overturn the parties’ settled understanding based on the Court’s prior
 28 ruling – and this time, the prejudice to Mr. Diaz and the Court is even greater, given Tesla’s prior

1 express acquiescence in the Court's order and the last-minute timing of Tesla's change of
 2 position, which would completely change the nature of the upcoming retrial.

3 a. April 22, 2022 Order on Post-Trial Motions (Dkt. No. 328)

4 Tesla first sought to challenge the jury's liability findings in November 2021 when it
 5 moved for judgment as a matter of law and for a new trial. The Court *rejected* Tesla's arguments,
 6 holding that "the weight of the evidence amply supports the jury's liability findings." (Dkt. 328,
 7 2:7.) Summarizing the evidence, the Court noted the heinousness of Tesla's conduct: "The
 8 evidence was disturbing. The jury heard that the Tesla factory was saturated with racism. Diaz
 9 faced frequent racial abuse, including the N-word and other slurs. Other employees harassed
 10 him. His supervisors, and Tesla's broader management structure did little or nothing to respond.
 11 And supervisors even joined in the abuse, one going so far as to threaten Diaz and draw a racist
 12 cartoon near his workstation." (Dkt. 328 at 1:19-23.) However, the Court granted Tesla's
 13 alternative motion for a remittitur (in part) – which was limited to a request for a *reduction* in the
 14 amount of compensatory and punitive damages. (Dkt. 328 at 2:9-17.)¹

15 The Court clearly stated in its order that "to the extent that Tesla's argument is that *no*
 16 punitive damages are warranted as a matter of law, I reject it...the jury had a legally sufficient
 17 basis to make *an* award of punitive damages." (Dkt. 328 at 37:17-19.) That ruling has governed
 18 all subsequent proceedings in this case for the past nine months.

19 Nothing in the reasoning of the Court's order provides any basis for reopening the first
 20 jury's finding that Tesla was liable for punitive damages. The Court analyzed only whether the
 21 punitive damages award was "unconstitutionally large," applying the "guideposts" set forth in
 22 *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The Court found that
 23 "Tesla's conduct falls high on the spectrum" of reprehensibility and that "the jury had sufficient
 24 grounds to find that Tesla's actions showed 'an indifference to or a reckless disregard' for Diaz's
 25 (and others') right to be safe and free from discrimination in the workplace." (Dkt. 328 at 38:18;
 26 39:3-5.) The Court found "Tesla's indifference to Diaz's complaints . . . striking" noting that

27 ¹ The Court conditionally denied the motion for a new trial based on Plaintiff accepting the
 28 Court's remittitur, stating that if Plaintiff rejects the remittitur, the Court *would grant a new trial on damages*. (Dkt. 328, 43:13-19.)

1 “attempting to pawn off responsibility for a safe and discrimination-free workplace would seem
 2 to be precisely the sort of extraordinary behavior punitive damages are built for.” (Dkt. 328 at
 3 38:5; 40:11-12.) The Court also held the evidence “supports a finding that Tesla intentionally
 4 built an employment structure that allowed it to take advantage of Diaz’s (and others’) labor for
 5 its benefit while attempting to avoid any of the obligations and responsibilities that employers
 6 owe employees.” (Dkt. 328 at 40:4-7.)

7 The Court concluded its analysis by stating that “[d]espite Tesla’s attempts to
 8 characterize it any other way, its treatment of Diaz – and the treatment of its supervisors and
 9 employees (or contractors) – falls high on the reprehensibility scale, requiring a high ratio.” (Dkt.
 10 328 at 42: 14-17.) Nothing in this analysis stated or implied that the jury’s finding of Tesla’s
 11 liability for punitive damages should be disturbed. To the contrary, the Court found that the
 12 jury’s finding of liability for punitive damages was amply supported by the weight of the evidence.

13 Tesla argues that the Court’s determination that substantial evidence supported the jury’s
 14 finding of liability for punitive damages is irrelevant. Not so. The Court’s remittitur—and
 15 subsequent new trial order, once the remittitur was rejected—was based entirely on the Court’s
 16 determination that the *amount* of compensatory and punitive damages awarded by the jury was
 17 too high. The Court never suggested that Tesla’s *liability* for punitive damages was a question
 18 that needed to be retried by a second jury, and the Court’s order provides no basis for that
 19 conclusion. To the contrary, the Court was unequivocal about Tesla’s liability for punitive
 20 damages, even if the amount awarded by the first jury was, in the Court’s view, excessive. The
 21 Court’s unmistakable view of the case, as expressed in that ruling, has guided the parties’ actions
 22 and negotiations for the last 10 months, and Tesla’s liability for punitive damages was never in
 23 question until this past Monday evening.

24 To reiterate, there is no reason why the Court would order a retrial on an issue which it
 25 did not identify as erroneous in the first trial: that Tesla was liable for punitive damages. The
 26 Court did not identify any infirmity in the jury’s finding that Tesla acted maliciously,
 27 oppressively, or recklessly – to the contrary, the Court found that Tesla’s conduct “falls high on
 28 the reprehensibility scale.” There is no reason to revisit the first jury’s finding on the issue of

1 entitlement to punitive damages, which the parties have never before understood to be within the
 2 scope of the retrial.

3 b. June 27, 2022 Order Granting Motion for New Damages Trial (Dkt. No. 348)

4 After Plaintiff rejected the remittitur of the jury’s award of damages, the Court reiterated
 5 its holding that “Tesla’s motion for judgment as a matter of law and a new trial on liability is
 6 DENIED,” and ordered “a new trial solely on damages.” (Dkt. 348.)

7 c. December 12, 2022 Order Denying New Trial On Liability (Dkt. No. 365)

8 Despite these clear orders from the Court, on October 14, 2022 Tesla once again moved
 9 for a new trial on liability, arguing that liability and damages are “inextricably interwoven.”
 10 (Dkt. 359.) The Court denied Tesla’s motion, pointing out that the Court “had already decided
 11 this question,” and holding that the motion is judicially estopped, procedurally barred, and fails
 12 on the merits. (Dkt. 365 at 1.)

13 The Court specifically found each of the three factors that courts consider when deciding
 14 to invoke judicial estoppel. As the Court pointed out, “the purpose of judicial estoppel ‘is to
 15 protect the integrity of the judicial process, by prohibiting parties from deliberately changing
 16 positions according to the exigencies of the moment...and to prevent improper use of judicial
 17 machinery.’” (Dkt. 365 at 3, citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).)

18 The Court further found that the motion was, at its core, a disguised motion for a new
 19 trial on liability – which Tesla had already attempted in its November 2021 motion and the Court
 20 had already specifically rejected. (Dkt. 365 at 4:20-24.) Thus, the Court held, Tesla’s motion was
 21 denied as procedurally barred and it reiterated that “the new trial will be held on damages only.”
 22 (Dkt. 365 at 7:2-3.)

23 Finally, the Court held that Tesla’s motion for a new trial on liability failed on the merits.
 24 The Court found that “it is clear that I may exercise my discretion to hold a new trial on damages
 25 only so long as the questions of damages and liability are not so interwoven as to confuse the
 26 jury or prejudice Tesla,” and that “based on the facts of this case, the issues of liability and
 27 damages are sufficiently distinct and separable as to permit a retrial on damages only.” (Dkt. 365
 28 at 10:4-5, 10-13.)

1 Tesla asserted for the first time in its February 6, 2023 email that the Court’s December
 2 12, 2022 order permits the jury to “make an independent determination about whether the
 3 conduct at issue was ‘malicious, oppressive or in reckless disregard of the plaintiff’s rights,’”
 4 citing Dkt. 365 at 13. Tesla’s position, that Diaz must once again prove malice, oppression, or
 5 reckless disregard, ignores the basic substantive findings by the Court outlined above.

6 Tesla’s change of position is purportedly based on its reading of a single paragraph in the
 7 Court’s order denying Tesla’s *Gasoline Products* motion. On page 13 of its Order, the Court
 8 stated that “while *Lutz* and *Wharf* specifically discuss separate trials for liability and
 9 compensatory damages, the reasoning also applies here to allow retrial of punitive damages
 10 without retrying liability” and that “[a]s outlined in the jury instructions, assessing punitive
 11 damages requires determining whether the conduct at issue was ‘malicious, oppressive or in
 12 reckless disregard of the plaintiff’s rights.’” (Dkt. 365 at 13:8-12.) Fairly read in the context of
 13 the rest of this order, as well as the Court’s other orders repeatedly denying Tesla’s attempts to
 14 hold a new trial on liability, Plaintiff does not understand the Court’s discussion to suggest that
 15 the damages-only retrial would also encompass the threshold question of whether Tesla was
 16 liable to pay punitive damages – a question the first jury unanimously resolved in favor of Mr.
 17 Diaz and that the Court upheld against Tesla’s post-trial motions challenges.

18 In that very same order, the Court specifically rejected Tesla’s argument that “federal law
 19 ‘generally require[s] that the same jury determine both *liability for, and the amount of, punitive*
 20 *damages* because those questions are so interwoven.’” (Dkt. 365 at 14, fn 9.) The Court found
 21 that the unpublished case cited by Tesla for this proposition, *Zender v. Vlasic Foods, Inc.*, 91
 22 F.3d 158 at *5 (9th Cir. 1996), was distinguishable and therefore “does not preclude a retrial on
 23 punitive damages alone here.” (*Id.*)

24 Accordingly, Plaintiff interpreted the Court’s discussion to mean simply that the retrial
 25 jury’s assessment of punitive damages will involve considering the *degree* of malice, oppression,
 26 or reckless disregard—the degree of reprehensibility—not that the retrial jury will be asked to
 27 decide whether there was *any* malice associated with Tesla’s conduct. That was Tesla’s
 28 interpretation of the Court’s order, too, up until this week.

2. Prior to February 6, 2023 Tesla Repeatedly Took the Position – in
 29 Communications with Plaintiff’s Counsel and the Court – that the Scope of the

Retrial Is Limited to the Amount of Punitive Damages and Not Plaintiff's Entitlement to Punitive Damages

Tesla asserts without citation or support that entitlement to punitive damages is “a damages issue” and “not a liability issue.” This contention is utterly disingenuous in light of Tesla’s communications with Plaintiff’s counsel and the Court prior to February 6, 2023, which clearly indicate its agreement that the damages-only retrial would assume entitlement to punitive damages.

In its December 7, 2022 Minute Order denying Tesla’s Motion for a New Trial, the Court ordered the parties to engage in a “robust discussion concerning the retrial and to present their areas of agreement and dispute in a Joint Case Management Statement.” (Dkt. 364.) Since the Court’s order, the parties have done exactly that – they have robustly debated the scope of the damages-only retrial. Throughout that debate, one thing has remained constant: counsel for both Diaz and Tesla have shared a mutual, repeatedly reaffirmed understanding that the scope of retrial is limited to the appropriate *amount* of compensatory and punitive damages, not Diaz’s entitlement to those damages.

Tesla's previously proposed Statement of the Case, Jury Instructions, and Verdict Form all clearly demonstrate Tesla's understanding and acceptance of the fact that the scope of retrial will encompass the *amount* of punitive damages, not whether Tesla is liable for punitive damages.

Tesla’s January 16, 2023 Proposed Statement of the Case reiterates the first jury’s finding that Tesla’s conduct warranted an award of punitive damages. It reads: “It was also determined that Tesla’s unlawful conduct was conducted with malice, oppression, or in reckless disregard of Mr. Diaz’s rights. As a result of those previous determinations, you will be asked to determine the extent and degree of punitive damages, if any, Mr. Diaz is entitled to recover from Tesla.” (Dkt. 374-1 Exhibit A.) By asserting that the jury must “determine the extent and degree of punitive damages” Tesla properly acknowledged the first jury’s previously uncontested finding that Tesla is liable for punitive damages.

Tesla’s Proposed Jury Instructions also demonstrate its understanding that only the amount of punitive damages, and not its liability for punitive damages, will be at issue in the

1 retrial. Tesla did not propose an instruction asking the jury to determine whether Tesla's conduct
 2 was "malicious, oppressive or in reckless disregard of plaintiff's rights." To the contrary, Tesla
 3 proposed a single jury instruction regarding punitive damages, focusing the jury's attention on
 4 the *amount* of punitive damages only: "Mr. Diaz has the burden of proving by a preponderance
 5 of the evidence the amount of punitive damages that should be awarded. You must use reason in
 6 setting the amount of punitive damages . . ." (Dkt. 374-2 Exhibit B.) Tesla's redlined versions of
 7 Plaintiff's Proposed Statement of the Case and Proposed Jury Instructions further confirm that
 8 Tesla did not previously seek to challenge the parties' understanding that Mr. Diaz's entitlement
 9 to punitive damages has already been definitively determined. Instead, Tesla it proposed *new*
 10 *language* affirming Diaz's entitlement to punitive damages: "It has also been found that Mr.
 11 Diaz is entitled to recover punitive damages." (Dkt. 374-4, Ex. D (redline of Plaintiff's Proposed
 12 Jury Instructions).)

13 Tesla's January 31, 2023 proposed verdict form perhaps most clearly demonstrates
 14 Tesla's previous understanding that the scope of retrial is limited to the *amount* of damages. The
 15 proposed form does *not* ask the jury to consider whether Tesla's conduct was malicious,
 16 oppressive, or in reckless disregard of the plaintiff's rights." Nor should it have, because that
 17 question was already resolved by the first jury and that portion of the verdict was upheld by this
 18 Court. Instead, Tesla asks just a single question regarding punitive damages: "What amount of
 19 punitive damages do you award to Owen Diaz? \$ _____" (2023.01.31 Tesla's
 20 Proposed Jury Verdict Form). Clearly, through at least January 31, 2023, Tesla understood that
 21 the scope of retrial did not include a second jury finding regarding whether Tesla was liable for
 22 punitive damages.

23 Tesla's Motions in Limine, which it filed on February 3, just three days before Tesla's
 24 about-face, also proceed from the assumption that Tesla's liability for punitive damages was
 25 already resolved – and in none of the exchange of drafts and meet and confer discussions about
 26 those MILs did Tesla even hint at its upcoming change in position (or put Plaintiff on notice that
 he might have to prepare an additional MIL of his own to address the issue).

27 Significantly, Tesla's Motion in Limine No. 4 uses the previously-unchallenged
 28 damages-only limitation at retrial as a sword to argue for exclusion of Diaz's "me too" evidence,

1 asserting: “Evidence of conduct not directed at or experienced by Mr. Diaz is constitutionally
 2 barred from a calculation of punitive damages.” (Dkt. 381 at 13:3-14.) Addressing this argument
 3 to the Court during the most recent status conference, Tesla’s counsel specifically represented to
 4 the Court that because the scope of retrial was limited to “the amount of damages” (as opposed
 5 to Diaz’s entitlement to damages) Diaz’s “me too” evidence must be barred:

6 **MR. POSNER:** Understood. And the other issue that I heard Your Honor say is
 7 that the “Me Too” evidence would likely go to pervasiveness for purposes of
 8 reprehensibility. We do think the law draws a pretty clear distinction, a clear
 9 distinction between the admissibility and the relevance of evidence of harm to
 10 others with respect to the threshold determination of reprehensibility and whether
 11 there should be punitive damages on the one hand and, on the other hand, the
 12 amount of punitive damages. **And so we made our pitch before that this trial,**
because of the overlapping evidence between liability and damages, should
revisit the findings of liability. We’re moving past that. But given that this
trial now is limited to damages, the amount of damages, we feel the law is
clear that that evidence doesn’t come in at all.

13 (1/17/23 Transcript at 8:9-23.) (Emphasis added.) While Plaintiff vehemently disagrees with
 14 Tesla’s assertion that “me too” evidence should be excluded on this basis, this colloquy
 15 demonstrates Tesla’s cynical willingness to disavow previously accepted positions when
 16 convenient. Tesla should be bound by its unequivocal representation to the Court – that the
 17 retrial is limited to “the amount of damages.” Its repeated shift of position based on the
 18 exigencies of the moment should not be countenanced, just as it was not countenanced the last
 19 time Tesla tried to obtain reconsideration of the Court’s post-trial orders while pretending to be
 20 doing something else entirely.

21 For all of these reasons, Tesla’s last-minute effort to re-open the issue of its liability for
 22 punitive damages, which is an improper motion for reconsideration of the Court’s post-trial
 23 rulings and completely inconsistent with the parties’ joint understanding of those rulings for the
 24 past 10 months, should be rejected.

25 **D. Defendant’s Position In Support Of Its Version Of Instruction**

26 Tesla proposes to more closely track the punitive damages instruction as given at the first
 27 trial. Mr. Diaz is wrong to argue that the first jury made a “binding determination” that Mr. Diaz
 28 is entitled to some amount of punitive damages. On this retrial, the first jury’s findings of

1 liability against Tesla will apply. Mr. Diaz's entitlement to punitive damages is a damages issue,
 2 however, not a liability issue. Indeed, in ruling on Tesla's motion for new trial on liability and
 3 damages, the Court recognized the distinction between the second jury's task in assessing
 4 punitive damages—including its assessment of “whether the conduct at issue was ‘malicious,
 5 oppressive or in reckless disregard of the plaintiff’s rights’”—and the first jury’s finding of a
 6 hostile work environment (in other words, the liability determination). Based on that distinction,
 7 the Court concluded it was not necessary to retry liability along with a retrial of punitive
 8 damages, as follows:

9 [W]hile Lutz and Wharf specifically discuss separate trials for liability and
 10 compensatory damages, the reasoning also applies here to allow retrial of punitive
 11 damages without retrying liability. As outlined in the jury instructions, assessing
 12 punitive damages requires determining whether the conduct at issue was
 13 “malicious, oppressive or in reckless disregard of the plaintiff’s rights.” Jury
 14 Instructions at 41. That question is not so intertwined with liability so as to
 confuse the jury. Asking whether Tesla acted maliciously, oppressively, or
 recklessly is a fundamentally different question from whether the environment
 itself was hostile, Tesla was a joint employer, there was a sufficient contractual
 relationship, Tesla failed to take reasonable steps to protect Diaz, or Tesla was
 negligent in supervising or continuing to employ Ramon Martinez.

15 Dkt. 365 at 13.

16 Accordingly, the Court previously concluded that the second jury will need to be
 17 instructed on how to determine “whether Tesla acted maliciously, oppressively, or recklessly,”
 18 and that this determination is fundamentally distinct from the first jury’s finding of liability.

19 Tesla also proposes to include the words “if any” in this instruction. Like the first jury,
 20 the second jury is entitled to award no punitive damages to Mr. Diaz. Nothing about the first
 21 jury’s finding of Tesla’s liability for creating a hostile work environment that will apply on the
 22 retrial requires the second jury to award any amount of punitive damages. Rather, Mr. Diaz still
 23 needs to prove such damages by a preponderance of the evidence. *See, e.g.*, Ninth Circuit Model
 24 Civil Jury Instruction 5.5.

25 Tesla also proposes to omit the portion of this instruction that would permit the jury to
 26 determine the appropriate amount of punitive damages by considering whether Tesla’s conduct
 27 “also caused actual harm or posed a substantial risk of harm to people who are not parties to this
 28 case.” As Tesla explained in its Motion in Limine No. 4 (Dkt. 381 at 11-17), which it

1 incorporates herein by reference, as a matter of law, the jury may not consider harm to others in
 2 determining the appropriate amount of punitive damages. *See, e.g., State Farm Mut. Auto. Ins.*
 3 *Co. v. Campbell*, 538 U.S. 408, 423 (2003) (“Due process does not permit courts, in the
 4 calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims
 5 against a defendant under the guise of the reprehensibility analysis.”); *White v. Ford Motor Co.*,
 6 500 F.3d 963, 972 (9th Cir. 2007) (vacating and remanding an award after trial in a product-
 7 liability case where plaintiffs’ counsel told the jury that “Ford knew that 54 people had been
 8 injured by ‘rollaways’” but had “‘decided to do everything possible to avoid telling people the
 9 truth’ about the rollaway problem,” reasoning that a calculation of punitive damages based on
 10 such other-party evidence “violated due process”).

11 Indeed, the language Tesla proposes to omit is internally inconsistent with the language
 12 in the following sentence of the instruction as proposed by Mr. Diaz stating: “You may not,
 13 however, set the amount of any punitive damages in order to punish Tesla for harm to anyone
 14 other than Mr. Diaz in this case.” Given that the jury may not set the amount of punitive
 15 damages based on harm to anyone other than Mr. Diaz, it is unnecessary, confusing, and
 16 potentially prejudicial to Tesla to instruct the jury that it may consider whether the alleged
 17 conduct that Mr. Diaz experienced also harmed or posed a risk of harm to others.

18 Mr. Diaz’s complaints about the timing of Tesla’s proposal of this instruction are
 19 meritless. Tesla proposed this final version of the instruction two days before the parties’
 20 deadline to file disputed jury instructions, three weeks before the pretrial conference, and six
 21 weeks before trial is set to begin, and thus it is undoubtedly timely. *See Nash v. Lewis*, 365 F.
 22 App’x 48, 51 n.2-3 (9th Cir. 2010) (party “timely objected, before the jury began deliberating, to
 23 all instructions proposed but not given” and “preserved his objection to the verdict form’s
 24 [omission] because [the party]’s proposed verdict form included a space for the jury to find” the
 25 proposed finding “before the jury rendered its verdict and was discharged”). Indeed, both parties
 26 have been revising their proposed jury instructions leading up to the deadline to file them with
 27 the Court. Mr. Diaz has had a full and fair opportunity to oppose this instruction, and his focus
 28

1 on the timing of Tesla's proposal of this instruction reveals the inadequacy in his substantive
2 opposition to it.

3 For these reasons, it is erroneous for Mr. Diaz to seek to exclude the portion of this instruction
4 that relates to the jury's finding of Mr. Diaz's entitlement to punitive damages. *See Merrick v.*
5 *Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007) ("Where a proposed instruction is
6 supported by law and not adequately covered by other instructions, the court should give a non-
7 misleading instruction that captures the substance of the proposed instruction." (emphasis
8 omitted)); *United States v. Unruh*, 855 F.2d 1363, 1372 (9th Cir. 1987) ("[T]he failure to give a
9 requested instruction is reversible error if the defendant's theory of the case is supported by law
10 and has some foundation in the evidence.").

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1 **[DISPUTED] JURY INSTRUCTION NO 12.**2 **NO INFERENCE TO BE DRAWN FROM ABSENT WITNESS**

3

4 Mr. Diaz has accused a former co-worker, Robert Hurtado, of making racially insensitive
 5 statements directed to him. Mr. Hurtado could not testify in this trial. You should not draw any
 6 inference about the credibility or truthfulness of Mr. Diaz's accusations about Mr. Hurtado based
 7 on the fact that Mr. Hurtado has not testified in this trial.

8 **A. Plaintiff's Position**

9 Plaintiff objects to this instruction because it unfairly bolsters Tesla's position and does
 10 not even attempt to be neutral. Plaintiff addressed this proposed instruction in more detail in its
 11 opposition to Tesla's MIL No. 1. The reason Mr. Hurtado "could not" testify is because Tesla
 12 failed to identify him in violation of the Court's rules and its specific discovery ruling. The
 13 statement that Mr. Hurtado "could not testify at this trial" is therefore misleading, as it suggests
 14 that Mr. Hurtado is not testifying for some benign reason, for example, as if he were prevented
 15 by illness rather than Tesla's prior litigation strategy and the resulting court ruling. Tesla's
 16 reference to "racially insensitive statements" mischaracterizes the evidence, which was that he
 17 used the N-word more than 30 times. The reference to "the credibility or truthfulness of Mr.
 18 Diaz's accusations about Mr. Hurtado" impermissibly invite the jury to draw the conclusion that
 19 Tesla was not responsible for Mr. Hurtado's failure to testify, that the testimony concerning Mr.
 20 Hurtado's repeatedly racists epithets was only minimally significant, and that if Mr. Hurtado had
 21 been able to testify, he would have successfully impeached Mr. Diaz's credibility in some
 22 unexplained. Tesla's misleading proposed instruction lacks any basis in law or fact and should be
 23 rejected in its entirety. Tesla is trying to avoid the consequences of its strategic decisions in the
 24 first trial. For example, it decided that instead of identifying and calling Mr. Hurtado, it would be
 25 preferable from Tesla's perspective to rely on the testimony of Joyce Delagrande to provide
 26 character evidence about Mr. Hurtado. That obviously did not work out for it. Finally, it is
 27 improper to give an instruction like this only as to one witness who was not called. In the last
 28 trial, for example, Plaintiff could have called, but did not call, Lamar Patterson, who could have

1 confirmed that Mr. Hurtado used the N-word in an interaction with Mr. Diaz in the elevator.
 2 Defense counsel commented on Mr. Patterson's absence from the trial.. Were the instruction to
 3 be neutral, it should include other witnesses that the parties identified on their witness list but
 4 failed to call.

5 **B. Defendant's Position**

6 Tesla explained the basis for this instruction in its Motion *In Limine* No. 1 regarding the
 7 testimony of Robert Hurtado (Dkt. 381 at 5), which it incorporates herein by reference. In
 8 summary, if the Court prohibits Mr. Hurtado from testifying at the retrial, then Mr. Diaz should
 9 not be permitted to invite the jury to draw any inference from Mr. Hurtado's absence from the
 10 retrial. Permitting Mr. Diaz to do so would be unduly prejudicial to Tesla given its and Mr.
 11 Hurtado's requests that the Court permit Mr. Hurtado to testify and Mr. Diaz's objections to him
 12 doing so.

13 Mr. Diaz is wrong to argue that the statement that "Mr. Hurtado could not testify in *this*
 14 trial" (emphasis added) is misleading because Tesla did not call Mr. Hurtado in the first trial.
 15 This instruction is designed to address the fact that Tesla in *this* trial has moved in limine to
 16 include Mr. Hurtado as witness. Should the Court preclude Tesla from calling Mr. Hurtado, then
 17 this instruction would serve to mitigate the prejudice to Tesla by the Court's ruling. Mr. Diaz's
 18 implied request to include other witnesses, like Mr. Patterson, who the "parties identified on their
 19 witness list but failed to call," is also inapt. Mr. Patterson is not a witness that Mr. Diaz moved
 20 in limine to include as a witness in this trial, and Mr. Diaz has not identified Mr. Patterson on his
 21 witness list in this trial.

22 Moreover, Tesla's requested reference to "credibility or truthfulness" is appropriate
 23 because Tesla is informing the jury not to accept Mr. Diaz's accusations as true simply because
 24 Mr. Hurtado did not testify to rebut such accusations. The jury may of course come to the
 25 conclusion that Mr. Diaz's accusations are credible and true for other reasons, based on its
 26 assessment of the witnesses who did testify and the evidence that was presented. However,
 27 given Tesla's requests that Mr. Hurtado be permitted to testify in this trial, it would be unfair and
 28

1 prejudicial to permit the jury to find that Mr. Diaz's accusations about Mr. Hurtado are credible
2 or true based on the fact that Mr. Hurtado did not testify.

3 For these reasons, it is erroneous for Mr. Diaz to seek to exclude this instruction. *See*
4 *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007) ("Where a proposed
5 instruction is supported by law and not adequately covered by other instructions, the court should
6 give a non-misleading instruction that captures the substance of the proposed instruction."
7 (emphasis omitted)); *United States v. Unruh*, 855 F.2d 1363, 1372 (9th Cir. 1987) ("[T]he failure
8 to give a requested instruction is reversible error if the defendant's theory of the case is
9 supported by law and has some foundation in the evidence.").

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1 **JOINTLY PROPOSED JURY INSTRUCTIONS**
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3 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 1**

4 **DUTY OF JURY**

5 **(COURT READS INSTRUCTIONS AT THE BEGINNING OF TRIAL AND AT END)**

6 **(Instruction No. 1 in 1st Trial—1.3)**

7
8 Members of the jury: You are now the jury in this case. It is my duty to instruct you on
9 the law.

10 It is your duty to find the facts from all the evidence in the case. To those facts you will
11 apply the law as I give it to you. You must follow the law as I give it to you whether you agree
12 with it or not. And you must not be influenced by any personal likes or dislikes, opinions,
13 prejudices or sympathy. That means that you must decide the case solely on the evidence before
14 you. You will recall that you took an oath to do so.

15 At the end of the trial I will give you final instructions. It is the final instructions that will
16 govern your duties.

17 Please do not read into these instructions, or anything I may say or do, that I have an
18 opinion regarding the evidence or what your verdict should be.

19 [First, I will remind you of some of the instructions I gave you at the outset on evaluating
20 the evidence, before I get into the substantive instructions.]

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 2:

2 BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

3 (Instruction No. 2 in 1st trial—1.6)

4

5 When a party has the burden of proving any claim or affirmative defense by a
6 preponderance of the evidence, it means you must be persuaded by the evidence that the claim or
7 affirmative defense is more probably true than not true.

8 You should base your decision on all of the evidence, regardless of which party presented
9 it.

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 3:

2 WHAT IS EVIDENCE

3 Instruction No. 3 in 1st trial—1.9 modified for tense)

5 The evidence you are to consider in deciding what the facts are consists of:

- 6 1. the sworn testimony of any witness;
- 7 2. the exhibits that are admitted into evidence;
- 8 3. any facts to which the lawyers have agreed; and
- 9 4. any facts that I [may instruct] [have instructed] you to accept as proved.

1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 4:

2 WHAT IS NOT EVIDENCE

3 Instruction No. 4 in 1st Trial—1.10)4
5 In reaching your verdict, you may consider only the testimony and exhibits received into
6 evidence. Certain things are not evidence, and you may not consider them in deciding what the
7 facts are. I will list them for you:8 (1) Arguments and statements by lawyers are not evidence. The lawyers are not
9 witnesses. What they [may say] [have said] in their opening statements, closing arguments and at
10 other times is intended to help you interpret the evidence, but it is not evidence. If the facts as
11 you remember them differ from the way the lawyers have stated them, your memory of them
12 controls.13 (2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their
14 clients to object when they believe a question is improper under the rules of evidence. You
15 should not be influenced by the objection or by the court's ruling on it.16 (3) Testimony that is excluded or stricken, or that you [are] [have been] instructed to
17 disregard, is not evidence and must not be considered. In addition some evidence [may be] [was]
18 received only for a limited purpose; when I [instruct] [have instructed] you to consider certain
19 evidence only for a limited purpose, you must do so and you may not consider that evidence for
20 any other purpose.21 (4) Anything you may [see or hear] [have seen or heard] when the court was not in
22 session is not evidence. You are to decide the case solely on the evidence received at the trial.

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 5:

2 EVIDENCE FOR LIMITED PURPOSE

3 (Instruction No. 5 at 1st trial—1.11 modified)

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5 Some evidence may be admitted only for a limited purpose.

6 When I instruct you that an item of evidence has been admitted only for a limited
7 purpose, you must consider it only for that limited purpose and not for any other purpose.

8 [I admitted Exhibit 106 for the limited purpose of your consideration of the credibility of
9 Edward Romero's [*and Victor Quintero's*] testimony and I allowed Wayne Jackson to testify
10 about his experience hearing the "n-word" in the Tesla factory. I want to remind you that this
11 case is about Mr. Diaz and the work environment that he experienced at the Tesla factory, not
12 what others in a different part of the factory experienced.]

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 6:

2 DIRECT AND CIRCUMSTANTIAL EVIDENCE

3 Instruction No. 6 in 1st trial—1.12

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5 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such
6 as testimony by a witness about what that witness personally saw or heard or did. Circumstantial
7 evidence is proof of one or more facts from which you could find another fact. You should
8 consider both kinds of evidence. The law makes no distinction between the weight to be given to
9 either direct or circumstantial evidence. It is for you to decide how much weight to give to any
10 evidence.

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 7:

2 RULING ON OBJECTIONS

3 (Instruction No. 7 in 1st trial—1.13)

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5 There are rules of evidence that control what can be received into evidence. When a
6 lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks
7 that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the
8 objection, the question may be answered or the exhibit received. If I sustain the objection, the
9 question cannot be answered, and the exhibit cannot be received. Whenever I sustain an
10 objection to a question, you must ignore the question and must not guess what the answer might
11 have been.

12 Sometimes I may order that evidence be stricken from the record and that you disregard
13 or ignore that evidence. That means when you are deciding the case, you must not consider the
14 stricken evidence for any purpose.

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 8:

2 CREDIBILITY OF WITNESSES

3 Instruction No. 8 in 1st trial—1.14

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5 In deciding the facts in this case, you may have to decide which testimony to believe and
6 which testimony not to believe. You may believe everything a witness says, or part of it, or none
7 of it.

8 In considering the testimony of any witness, you may take into account:

9 (1) the opportunity and ability of the witness to see or hear or know the things testified
10 to;

11 (2) the witness's memory;

12 (3) the witness's manner while testifying;

13 (4) the witness's interest in the outcome of the case, if any;

14 (5) the witness's bias or prejudice, if any;

15 (6) whether other evidence contradicted the witness's testimony;

16 (7) the reasonableness of the witness's testimony in light of all the evidence; and

17 (8) any other factors that bear on believability.

18 Sometimes a witness may say something that is not consistent with something else he or
19 she said. Sometimes different witnesses will give different versions of what happened. People
20 often forget things or make mistakes in what they remember. Also, two people may see the same
21 event but remember it differently. You may consider these differences, but do not decide that
22 testimony is untrue just because it differs from other testimony.

23 However, if you decide that a witness has deliberately testified untruthfully about
24 something important, you may choose not to believe anything that witness said. On the other
25 hand, if you think the witness testified untruthfully about some things but told the truth about
26 others, you may accept the part you think is true and ignore the rest.

1 The weight of the evidence as to a fact does not necessarily depend on the number of
2 witnesses who testify. What is important is how believable the witnesses were, and how much
3 weight you think their testimony deserves.

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 9:

2 IMPLICIT BIAS

3 (Instruction No. 9 in 1st trial)

4

5 We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some
 6 biases we are aware of, and others we might not be fully aware of, which is why they are called
 7 implicit or unconscious biases. No matter how unbiased we think we are, our brains are
 8 hardwired to make unconscious decisions. We look at others and filter what they say through our
 9 own personal experience and background. Because we all do this, we often see life and evaluate
 10 evidence in a way that tends to favor people who are like ourselves, or who have had life
 11 experiences like our own. We can also have biases about people like ourselves. One common
 12 example is the automatic association of male with career and female with family. Bias can affect
 13 our thoughts, how we remember what we see and hear, whom we believe or disbelieve, and how
 14 we make important decisions.

15 As jurors, you are being asked to make an important decision in the case. You must one,
 16 take the time you need to reflect carefully and thoughtfully about the evidence.

17 Two, think about why you are making the decision you are making and examine it for
 18 bias. Reconsider your first impressions of the people and the evidence in this case. If the people
 19 involved in this case were from different backgrounds, for example, richer or poorer, more or
 20 less educated, older or younger, or of a different gender, gender identity, race, religion or sexual
 21 orientation, would you still view them, and the evidence, the same way?

22 Three, listen to one another. You must carefully evaluate the evidence and resist, and
 23 help each other resist, any urge to reach a verdict influenced by bias for or against any party or
 24 witness. Each of you have different backgrounds and will be viewing this case in light of your
 25 own insights, assumptions and biases. Listening to different perspectives may help you to better
 26 identify the possible effects these hidden biases may have on decision making.

27 And four, resist jumping to conclusions based on personal likes or dislikes,
 28 generalizations, gut feelings, prejudices, sympathies, stereotypes, or unconscious biases.

1 The law demands that you make a fair decision based solely on the evidence, your
2 individual evaluations of that evidence, your reason and common sense, and these instructions.
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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 10:**

2 **PUBLICITY DURING TRIAL**

3 **(Instruction No. 10 in 1st Trial—1.16)**

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5 If there is any news media account or commentary about the case or anything to do with
6 it, you must ignore it. You must not read, watch or listen to any news media account or
7 commentary about the case or anything to do with it. The case must be decided by you solely and
8 exclusively on the evidence that will be received in the case and on my instructions as to the law
9 that applies. If any juror is exposed to any outside information, please notify me immediately.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 11:**
2 **TAKING NOTES**

3 **(Instruction No. 11 in 1st Trial—1.18)**

4

5 If you wish, you may take notes to help you remember the evidence. If you do take notes,
6 please keep them to yourself until you go to the jury room to decide the case. Do not let
7 notetaking distract you. When you leave, your notes should be left in the [courtroom] [jury
8 room] [envelope in the jury room]. No one will read your notes.

9 Whether or not you take notes, you should rely on your own memory of the evidence.

10 Notes are only to assist your memory. You should not be overly influenced by your notes
11 or those of other jurors.

12 [You may have taken notes to help you remember the evidence. Whether or not you took
13 notes, you should rely on your own memory of the evidence. Notes are only to assist your
14 memory. You should not be overly influenced by your notes or those of other jurors.]

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 12:**

2 **DEPOSITION IN LIEU OF LIVE TESTIMONY**

3 **Instruction No. 12 in 1st trial—2.4**

4

5 A deposition is the sworn testimony of a witness taken before trial. The witness is placed
6 under oath to tell the truth and lawyers for each party may ask questions. The questions and
7 answers are recorded. When a person is unavailable to testify at trial, the deposition of that
8 person may be used at the trial.

9 The deposition of KEVIN MCGINN was taken on June 17, 2019. The deposition of
10 DEMETRIC DIAZ was taken on May 15, 2018. The deposition of ERIN MARCONI was taken
11 on October 21, 2019. The deposition of ANNALISA HEISEN was taken May 29, 2019. Insofar
12 as possible, you should consider deposition testimony, presented to you in court in lieu of live
13 testimony, in the same way as if the witness had been present to testify.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 13:**

2 **IMPEACHMENT EVIDENCE—WITNESS**

3 **Instruction No. 13 in 1st trial—2.9**

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5 The evidence that a witness lied under oath on a prior occasion may be considered, along
6 with all other evidence, in deciding whether or not to believe the witness and how much weight
7 to give to the testimony of the witness and for no other purpose.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 14:**

2 **USE OF INTERROGATORIES**

3 **(Instruction No. 14 in 1st trial—2.11)**

5 Evidence was presented to you in the form of answers of one of the parties to written
6 interrogatories submitted by the other side. These answers were given in writing and under oath
7 before the trial in response to questions that were submitted under established court procedures.
8 You should consider the answers, insofar as possible, in the same way as if they were made from
9 the witness stand.

1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 15:**

2 **USE OF REQUESTS FOR ADMISSION**

3 **(Instruction No. 15 in 1st trial—2.12)**

5 Evidence was presented to you in the form of admissions to the truth of certain facts.

6 These admissions were given in writing before the trial, in response to requests that were
7 submitted under established court procedures. You must treat these facts as having been proved.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 16:**

2 **EXPERT OPINION**

3 **(Instruction No. 16 in 1st trial—2.13)**

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5 You [will hear] [have heard] testimony from Anthony Reading, Amy Oppenheimer and
6 Charles Mahla who testified to opinions and the reasons for their opinions. This opinion
7 testimony is allowed, because of the education or experience of this witness. Such opinion
8 testimony should be judged like any other testimony. You may accept it or reject it, and give it as
9 much weight as you think it deserves, considering the witness's education and experience, the
10 reasons given for the opinion, and all the other evidence in the case.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 17:**
2 **CORPORATIONS AND PARTNERSHIPS—FAIR TREATMENT**
3 **(Instruction No. 17 in 1st trial—4.1)**

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5 All parties are equal before the law and a corporation is entitled to the same fair and
6 conscientious consideration by you as any party.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 18:**

2 **LIABILITY OF CORPORATIONS – SCOPE OF AUTHORITY NOT IN ISSUE**

3 **Instruction No. 18 in 1st trial—4.2**

4

5 Under the law, a corporation is considered to be a person. It can only act through its
6 employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its
7 employees, agents, directors, and officers performed within the scope of authority.

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1 [JOINTLY PROPOSED] JURY INSTRUCTION NO. 19:

2 JOINT EMPLOYMENT

3 Instruction No. 24 in 1st trial—modified for retrial)

4

5 A person can have more than one employer. Even though Owen Diaz worked at Tesla's
6 Fremont factory through a staffing agency, it has been determined that Tesla is a joint employer
7 of Owen Diaz. You are not to question this finding.

8 Whenever these instructions reference "employment," "employer," "employee,"
9 "employ," or "employed," they can refer to a joint employment relationship.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 20:**
2 **BENCH CONFERENCES AND RECESSES**

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4 From time to time during the trial, it [may become] [became] necessary for me to talk
5 with the attorneys out of the hearing of the jury, either by having a conference at the bench when
6 the jury [is] [was] present in the courtroom, or by calling a recess. Please understand that while
7 you [are] [were] waiting, we [are] [were] working. The purpose of these conferences is not to
8 keep relevant information from you, but to decide how certain evidence is to be treated under the
9 rules of evidence and to avoid confusion and error.

10 Of course, we [will do] [have done] what we [can] [could] to keep the number and length
11 of these conferences to a minimum. I [may] [did] not always grant an attorney's request for a
12 conference. Do not consider my granting or denying a request for a conference as any indication
13 of my opinion of the case or of what your verdict should be.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 21:**
2 **CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE**

4 Certain charts and summaries not admitted into evidence [may be] [have been] shown to
5 you in order to help explain the contents of books, records, documents, or other evidence in the
6 case. Charts and summaries are only as good as the underlying evidence that supports them. You
7 should, therefore, give them only such weight as you think the underlying evidence deserves.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 22:**
2 **CHARTS AND SUMMARIES RECEIVED IN EVIDENCE**
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4 Certain charts and summaries [may be] [have been] admitted into evidence to illustrate
5 information brought out in the trial. Charts and summaries are only as good as the testimony or
6 other admitted evidence that supports them. You should, therefore, give them only such weight
7 as you think the underlying evidence deserves.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 23:**
2 **WITNESSES DESIGNATED AS “PERSONS MOST KNOWLEDGEABLE”**
3 **(Submitted in 1st trial as Plaintiff’s Special Instruction No. 12 but not given)**

4

5 You are about to hear testimony from a witness who, when depositions were taken
6 previously in this case, was designated by Tesla as a “person most knowledgeable”
7 regarding certain specific subjects and issues identified by Mr. Diaz.

8 Testimony from a witness who has been identified by a corporation as a “person most
9 knowledgeable” represents the company’s knowledge, not the individual witness’s knowledge.
10 The company must prepare the “person most knowledgeable” to testify on the designated
11 subjects and issues based on information reasonably available from documents, current or past
12 employees, or other sources. Because the testimony from the “person most knowledgeable”
13 reflects the company’s knowledge, rather than the individual witness’s personal knowledge, if a
14 certain fact is within the collective knowledge or subjective belief of the company, the “person
15 most knowledgeable” is allowed to testify to that fact even though the fact is not within the
16 personal knowledge of the witness designated as the “person most knowledgeable” regarding
17 that fact. Thus, a witness designated as the “person most knowledgeable” is free to testify to
18 matters outside of his or her personal knowledge as long as they were within the company’s
19 collective knowledge.

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21 **COMMENT/AUTHORITY:**

22 *ISG Insolvency Group, Inc. v. Meritage Homes Corp. et al.*, 2013 U. S. Dist. LEXIS 84726 at
23 *11-*12 (D. Nev. 2013)

1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 24:**
2 **OUTLINE OF TRIAL**

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4 Trials proceed in the following way: First, each side may make an opening statement. An
5 opening statement is not evidence. It is simply an outline to help you understand what that party
6 expects the evidence will show. A party is not required to make an opening statement.

7 The plaintiff will then present evidence, and counsel for the defendant may cross-
8 examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-
9 examine.

10 After the evidence has been presented, I will instruct you on the law that applies to the
11 case and the attorneys will make closing arguments.

12 After that, you will go to the jury room to deliberate on your verdict.

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[JOINTLY PROPOSED] JURY INSTRUCTION NO. 25:**CONDUCT OF THE JURY**

4 I will now say a few words about your conduct as jurors.

5 First, keep an open mind throughout the trial, and do not decide what the verdict should
6 be until you and your fellow jurors have completed your deliberations at the end of the case.

7 Second, because you must decide this case based only on the evidence received in the
8 case and on my instructions as to the law that applies, you must not be exposed to any other
9 information about the case or to the issues it involves during the course of your jury duty. Thus,
10 until the end of the case or unless I tell you otherwise:

11 Do not communicate with anyone in any way and do not let anyone else communicate
12 with you in any way about the merits of the case or anything to do with it. This includes
13 discussing the case in person, in writing, by phone or electronic means, via email, text
14 messaging, or any internet chat room, blog, website or application, including but not limited to
15 Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media.
16 This applies to communicating with your fellow jurors until I give you the case for deliberation,
17 and it applies to communicating with everyone else including your family members, your
18 employer, the media or press, and the people involved in the trial, although you may notify your
19 family and your employer that you have been seated as a juror in the case, and how long you
20 expect the trial to last. But, if you are asked or approached in any way about your jury service or
21 anything about this case, you must respond that you have been ordered not to discuss the matter
22 and report the contact to the court.

23 Because you will receive all the evidence and legal instruction you properly may consider
24 to return a verdict: do not read, watch or listen to any news or media accounts or commentary
25 about the case or anything to do with it[,although I have no information that there will be news
26 reports about this case]; do not do any research, such as consulting dictionaries, searching the
27 Internet, or using other reference materials; and do not make any investigation or in any other
28 way try to learn about the case on your own. Do not visit or view any place discussed in this

1 case, and do not use Internet programs or other devices to search for or view any place discussed
2 during the trial. Also, do not do any research about this case, the law, or the people involved—
3 including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you
4 happen to read or hear anything touching on this case in the media, turn away and report it to me
5 as soon as possible.

6 These rules protect each party's right to have this case decided only on evidence that has
7 been presented here in court. Witnesses here in court take an oath to tell the truth, and the
8 accuracy of their testimony is tested through the trial process. If you do any research or
9 investigation outside the courtroom, or gain any information through improper communications,
10 then your verdict may be influenced by inaccurate, incomplete or misleading information that
11 has not been tested by the trial process. Each of the parties is entitled to a fair trial by an
12 impartial jury, and if you decide the case based on information not presented in court, you will
13 have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it
14 is very important that you follow these rules.

15 A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and
16 a mistrial could result that would require the entire trial process to start over]. If any juror is
17 exposed to any outside information, please notify the court immediately.

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[JOINTLY PROPOSED] JURY INSTRUCTION NO. 26:

DUTY OF JURY

(COURT READS AND PROVIDES WRITTEN INSTRUCTIONS AT END OF CASE)

Members of the Jury: Now that you have heard all of the evidence [and the arguments of the attorneys], it is my duty to instruct you on the law that applies to this case.

[Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.]

or

[A copy of these instructions will be sent to the jury room for you to consult during your deliberations.]

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

Comment

This instruction should be used with the written final set of the instructions to be sent to the jury. Bracketed material should be selected to cover whether single or multiple sets of written instructions are provided.

[JOINTLY PROPOSED] JURY INSTRUCTION NO. 27:**EVIDENCE IN ELECTRONIC FORMAT****(Instruction No. 43 in 1st trial)**

Those exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer will be available to you in the jury room.

The courtroom deputy will show you how to operate the computer and how to locate and view the exhibits on the computer. You will also be provided with a paper list of all exhibits received in evidence. You may request a paper copy of any exhibit received in evidence by sending a note through the clerk.) If you need additional equipment or supplies or if you have questions about how to operate the computer, you may send a note to the clerk, signed by your foreperson or by one or more members of the jury. Do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with [the clerk] [the bailiff] present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any nonjuror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any nonjuror other than to describe the technical problem or to seek information about operation of the equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to ensure that the computer does not permit access to the Internet or to any “outside” website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform the court

1 immediately and refrain from viewing such materials. Do not remove the computer or any
2 electronic data [disk] from the jury room, and do not copy any such data.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 28:**

2 **DUTY TO DELIBERATE**

3 **Instruction No. 42 in 1st trial—3.1**

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5 Before you begin your deliberations, elect one member of the jury as your presiding
6 juror. The presiding juror will preside over the deliberations and serve as the spokesperson for
7 the jury in court.

8 You shall diligently strive to reach agreement with all of the other jurors if you can do so.
9 Your verdict must be unanimous.

10 Each of you must decide the case for yourself, but you should do so only after you have
11 considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

12 It is important that you attempt to reach a unanimous verdict but, of course, only if each
13 of you can do so after having made your own conscientious decision. Do not be unwilling to
14 change your opinion if the discussion persuades you that you should. But do not come to a
15 decision simply because other jurors think it is right, or change an honest belief about the weight
16 and effect of the evidence simply to reach a verdict.

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[JOINTLY PROPOSED] JURY INSTRUCTION NO. 29:
CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY
(Instruction No. 44 in 1st trial—3.2)

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, computer, or any other means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, TikTok, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it[; although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

1 These rules protect each party's right to have this case decided only on evidence that has
2 been presented here in court. Witnesses here in court take an oath to tell the truth, and the
3 accuracy of their testimony is tested through the trial process. If you do any research or
4 investigation outside the courtroom, or gain any information through improper communications,
5 then your verdict may be influenced by inaccurate, incomplete or misleading information that
6 has not been tested by the trial process. Each of the parties is entitled to a fair trial by an
7 impartial jury, and if you decide the case based on information not presented in court, you will
8 have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it
9 is very important that you follow these rules.

10 A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and
11 a mistrial could result that would require the entire trial process to start over]. If any juror is
12 exposed to any outside information, please notify the court immediately.

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1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 30:**

2 **COMMUNICATION WITH COURT**

3 **Instruction No. 45 in 1st trial—3.3**

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5 If it becomes necessary during your deliberations to communicate with me, you may send
6 a note through the deputy, signed by any one or more of you. No member of the jury should ever
7 attempt to communicate with me except by a signed writing. I will not communicate with any
8 member of the jury on anything concerning the case except in writing or here in open court. If
9 you send out a question, I will consult with the lawyers before answering it, which may take
10 some time. You may continue your deliberations while waiting for the answer to any question.
11 Remember that you are not to tell anyone—including the court—how the jury stands, whether in
12 terms of vote count or otherwise, until after you have reached a unanimous verdict or have been
13 discharged.

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[JOINTLY PROPOSED] JURY INSTRUCTION NO. 31:
READBACK OR PLAYBACK

If during jury deliberations a request is made by the jury or by one or more jurors for a readback of a portion or all of a witness's testimony, and the court in exercising its discretion determines after consultation with the lawyers that a readback should be allowed, the Committee recommends the following admonition be given in open court with both sides present:

Because a request has been made for a [readback] [playback] of the testimony of [witness's name] it is being provided to you, but you are cautioned that all [readbacks] [playbacks] run the risk of distorting the trial because of overemphasis of one portion of the testimony. [Therefore, you will be required to hear all the witness's testimony on direct and cross-examination, to avoid the risk that you might miss a portion bearing on your judgment of what testimony to accept as credible.] [Because of the length of the testimony of this witness, excerpts will be [read] [played].] The [readback] [playback] could contain errors. The [readback] [playback] cannot reflect matters of demeanor [, tone of voice,] and other aspects of the live testimony. Your recollection and understanding of the testimony controls. Finally, in your exercise of judgment, the testimony [read] [played] cannot be considered in isolation, but must be considered in the context of all the evidence presented.

Although a court has broad discretion to read back excerpts or the entire testimony of a witness when requested by a deliberating jury, precautionary steps should be taken. Absent the parties' stipulation to a different procedure, the jury should be required to hear the readback in open court, with counsel for both sides present, and after giving the admonition set out above.

1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 32:**

2 **RETURN OF VERDICT**

3 **(Instruction No. 46 in 1st trial—3.5)**

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5 A verdict form has been prepared for you. After you have reached unanimous agreement
6 on a verdict, your foreperson should complete the verdict form according to your deliberations,
7 sign and date it, and advise the deputy that you are ready to return to the courtroom.

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[JOINTLY PROPOSED] JURY INSTRUCTION NO. 33:
DEADLOCKED JURY

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

6 As jurors, you have a duty to discuss the case with one another and to deliberate in an
7 effort to reach a unanimous verdict if each of you can do so without violating your individual
8 judgment and conscience. Each of you must decide the case for yourself, but only after you
9 consider the evidence impartially with the other jurors. During your deliberations, you should not
10 be unwilling to reexamine your own views and change your opinion if you become persuaded
11 that it is wrong. However, you should not change an honest belief as to the weight or effect of
12 the evidence solely because of the opinions of the other jurors or for the mere purpose of
13 returning a verdict.

14 All of you are equally honest and conscientious jurors who have heard the same
15 evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself
16 whether you should question the correctness of your present position.

17 I remind you that in your deliberations you are to consider the instructions I have given
18 you as a whole. You should not single out any part of any instruction, including this one, and
19 ignore others. They are all equally important.

You may now return to the jury room and continue your deliberations.

1 **[JOINTLY PROPOSED] JURY INSTRUCTION NO. 34:**

2 **CONTINUING DELIBERATIONS AFTER JUROR IS DISCHARGED**

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4 [One] [Some] of your fellow jurors [has] [have] been excused from service and will not
5 participate further in your deliberations. You should not speculate about the reason the [juror is]
6 [jurors are] no longer present.

7 You should continue your deliberations with the remaining jurors. Do not consider the
8 opinions of the excused [juror] [jurors] as you continue deliberating. All the previous instructions
9 given to you still apply, including the requirement that all the remaining jurors unanimously
10 agree on a verdict.

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